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27 ✓

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TABLE OF CASES

REPORTED AND NOTED IN THIS VOLUME

| | PAGE | | PAGE |
|--|----------|--|----------|
| Abrahams v. Dimmock | 322 | Cimonian, Re | 448 |
| Adams v. Thrift | 318, 359 | City of Halifax v. Tobin | 109 |
| Adam Steamship Co. v. London Assurance Corporation | 148 | Clandown Colliery Co., In re | 295 |
| Amorette v. James | 233 | Clare v. Dresdner Bank | 366 |
| Attorney-General of Alberta v. Attorney-General of Canada | 332 | Clifford v. Battley | 248 |
| Attorney-General v. Roe | 239 | Clowes v. Clerke, In re Clerke | 445 |
| Aynsley Kyrle v. Turner, In re | 26 | Cobb v. Saxby | 32 |
| | | Coffin v. Gillies | 414 |
| Baillie v. Oriental Telephone Co. | 316 | Company, A., In re | 317 |
| Balmukand v. the King-Emperor | 491 | Continental Tyre & Rubber Co. v. Daimler Co. | 327 |
| Balmukand and Others v. The King-Emperor | 411 | Corrie v. MacDermott | 104 |
| Beard v. Moira Colliery Co. | 293 | Creveling v. Canadian Bridge Co. | 302 |
| Becker v. London Assurance Co. | 491 | | |
| Belanger v. Montreal Water and Power Co. | 62 | Davies v. Burgess, In re Safford | 441 |
| Berry v. Humm | 320 | Davies v. James Bay Ry. Co. | 103 |
| Birkbeck Permanent Building Society, In re | 237 | Dobson v. Horsley | 321 |
| Blacklock v. Pearson | 489 | Dorchester Electric Co. v. The King | 493 |
| Blakey v. Harrison | 480 | Dunlop Pneumatic Tyre Co. v. New Garage and M. Co. | 250 |
| Board of Trim District School v. Kelly | 100 | Ellis v. Cross | 367 |
| Brauchle v. Lloyd | 337 | Evangeline Fruit Co. v. Provincial Fire Insurance Co. | 372 |
| British Columbia Electric Ry. v. Vancouver, Victoria and Eastern Ry. | 222 | | |
| British Dominions General Insce. Co. v. Duder | 33, 364 | Farmer's Mart v. Milne | 329 |
| British Electric Ry. Co. v. Gentile | 103 | Ferne v. Gorlitz | 238 |
| British R.C.B. Fund, v. Johnson, In re | 26 | Ferrers v. Croxton | 444 |
| | | Finch v. Smith, In re Ainsworth | 360 |
| Campbellford, etc., Ry. Co. v. Massie | 110 | Fleetwood and D.E.L. & P. Syndicate, In re | 299 |
| Canadian Northern Ontario R.W. Co. v. Holditch | 35 | Flude v. Goldberg | 328 |
| Canadian Northern Ry. Co. v. Smith | 112 | France Fenwick & Co. v. Merchants Marine Insce. Co. | 490 |
| Canadian Pacific Ry. v. Canadian Oil Co. | 102 | France Fenwick & Co. v. Merchants Marine Insurance Co. | 33 |
| Canadian Pacific Ry. Co. v. Parent & Chalifour | 300 | Fratelli Sorentino v. Buerger | 242, 490 |
| Capital Life Assurance Co. v. Parker | 373 | Frontenac Gas Company v. The King | 412 |
| Champion v. World Building Co. | 63 | | |
| Chapman v. Purtell | 374 | Gabriel v. Churchill | 223 |
| Charing Cross Electricity Supply Co. v. Hydraulic Power Co. | 31 | Galloway v. Halle Concerts Society | 442 |
| | | Gibb v. The King | 66 |
| | | Giles v. Randall | 241 |
| | | Goby v. Wetherill | 368 |
| | | Godman v. Crafton | 31 |
| | | Godson's Claim, In re Law Guarantee T. & A. Societies | 295 |
| | | Goldsoll v. Goldman | 225 |
| | | Goldsoll v. Goldman | 293 |

| | PAGE | | PAGE |
|--|----------|---|------|
| Goldstein v. Sanders..... | 318 | King, The, v. Humphrys..... | 147 |
| Grand Trunk Pacific Ry. Co. v. Pickering..... | 109 | King, The, v. Ingleson..... | 247 |
| Griggs, In re..... | 30 | King, The, v. Ketteridge..... | 246 |
| Groom v. Barber..... | 242 | King, The, v. Lesbini..... | 145 |
| Guaranty Trust Co. v. Hannay..... | 366 | King, The, v. London County Council..... | 365 |
| Guardian Assurance Co. v. Town of Chicoutimi..... | 413 | King, The, v. Macpherson..... | 65 |
| Gunyon v. South Eastern & Chatham Ry..... | 363 | King, The, v. Noel..... | 34 |
| Hadsley v. Dayer-Smith..... | 102 | King, The, v. Norman..... | 243 |
| Halparin v. Bulling..... | 149 | King, The, v. Oppenheimer..... | 445 |
| Halton Brick Co. v. McNally..... | 111 | King, The, v. Sagar..... | 144 |
| Hamilton Street Railway Co. v. Weir..... | 414 | King, The, v. Robinson..... | 363 |
| Harris v. Taylor..... | 367 | King, The, v. Registrar of Companies..... | 146 |
| Hargrove v. Pain..... | 298 | King, The, v. Whitaker..... | 223 |
| Hatton v. Car Maintenance Co..... | 319 | King, The, v. Wilson et al..... | 64 |
| Healey v. Healey..... | 327 | King v. Kupfer..... | 362 |
| Herd v. Weardale Steel C. and C. Co..... | 249 | Konski v. Peet..... | 317 |
| Hewett v. Eldridge, In re Hewett..... | 357 | Koop v. Smith..... | 411 |
| Hewitt v. Wilson..... | 145, 369 | Lareau v. Poirier..... | 448 |
| Hickman v. Kent or Romney Marsh Sheep Breeders' Assn..... | 358 | Law Guarantee T. & A. Society, In re..... | 226 |
| Higgins v. Beauchamp..... | 146 | Leamy et al. v. The King..... | 67 |
| Higginson v. Burton..... | 297 | Leigh v. Pantin..... | 227 |
| Hitchings & Coulthurst Co. v. Northern Leather Co..... | 34 | Leslie v. Reliable Advertising Co..... | 322 |
| Hobson v. Leng..... | 148 | Levine v. Serling..... | 100 |
| Holland v. Clapton, In re Holland..... | 225 | Lightfoot v. Maybery..... | 100 |
| Hosoon v. Loock..... | 444 | Limond v. Cunliffe..... | 442 |
| Howard v. Stewart..... | 63 | Liverpool Society for Prevention of Cruelty to Children v. Jones..... | 32 |
| Howell v. Dering..... | 231 | Lloyd v. Coote..... | 241 |
| Hurst v. Picture Theatres..... | 229 | Local Government Board v. Arlidge..... | 329 |
| Hyde v. Webster..... | 36 | Maisel v. Financial Times..... | 490 |
| Industrials Syndicate v. Lind..... | 488 | Mariette v. Aldenham School..... | 443 |
| Ingle v. Mannheim Insce. Co..... | 239 | Mash v. Darley..... | 147 |
| Jackson, In re..... | 244 | Mathers v. Penfold..... | 247 |
| Jacques-Cartier Electric Co., The Quebec, v. The King..... | 412 | Matsoukis v. Priestman..... | 323 |
| Jay's v. Brand..... | 246 | May v. Borup..... | 326 |
| John Deere Plow Co. v. Wharton..... | 105, 330 | Mayner v. Payne..... | 223 |
| Johnston v. Chestergate..... | 488 | Meade-King v. Jacobs..... | 367 |
| Joicey v. Elliot..... | 360 | McGregor v. Telford..... | 446 |
| Jureidini v. National British & I.M. Insce. Co..... | 333 | MicHELL v. Bubna, Re Sutherland..... | 228 |
| Karberg & Co. v. Blythe..... | 363 | Mickelson Chapiro Co., etc., In re..... | 68 |
| Kenford v. Kennard..... | 440 | Miramichi, The..... | 293 |
| Kim, The..... | 486 | Morell & Chapman, In re..... | 238 |
| King, The, v. Amendt..... | 328 | Morgan, In re..... | 238 |
| King, The, v. Ahlers..... | 319 | Morris v. Saxelby..... | 359 |
| King, The, v. Hopper..... | 364 | Moser, Ex parte..... | 369 |
| | | Muir, Estate of R., v. Treasurer of Province of Manitoba..... | 370 |
| | | Myers v. Bradford..... | 245 |
| | | Nocton v. Ashburton..... | 101 |
| | | Norfolk v. Roberts..... | 35 |
| | | Norman v. Great Western Ry..... | 248 |

TABLE OF CASES.

V

| | PAGE | | PAGE |
|--|------|---|------|
| O'Driscoll v. Manchester Insee. Committee..... | 325 | Saskatchewan Land and Homestead Co. v. Calgary and Edmonton Ry. Co..... | 237 |
| Olympia Oil Cake Co. v. Produce Brokers..... | 240 | Savory v. World of Golf..... | 224 |
| Peacock v. Wilkinson..... | 300 | Scott v. Scott, In re Scott..... | 319 |
| Perkins v. Jeffery..... | 369 | Seaver v. The Company, In re Smelting Corporation..... | 298 |
| Peruvian Ry. Construction Co., In re..... | 362 | Servant v. Hills, In re Chester..... | 224 |
| Petty v. Parsons..... | 227 | Smith v. Colbourne..... | 29 |
| Phelan v. Grand Trunk Pacific Ry. Co..... | 254 | Spencer v. National Association..... | 356 |
| Poole v. The Company, Re Stephenson..... | 357 | Stephens v. Junior Army and Navy Stores..... | 28 |
| Porter v. Freudenberg..... | 327 | Stickney v. Keeble..... | 332 |
| Porter v. Tottenham Urban District Council..... | 324 | Stunt v. Jones, In re Jones..... | 296 |
| Potter v. Welch..... | 144 | The Kim..... | 486 |
| Price v. Chicoutimi Pulp Co..... | 253 | Thomas v. Sully, Re Thomas..... | 294 |
| Pringle v. Anderson..... | 149 | Thurn v. Moffitt..... | 236 |
| Public Trustee v. Clarkson..... | 441 | Toronto Power Co. v. Rayner..... | 374 |
| Purchase v. Lichfield Brewery Co..... | 234 | Transvaal Lands Co. v. New Belgium, etc., Co..... | 27 |
| Pwllbach Colliery Co. v. Woodman..... | 492 | Travers v. Cooper..... | 232 |
| Pyman S.S. Co. v. Hull and Barnsley Ry..... | 445 | Trustees of Regina Public School v. Trustees of Graton Separate School..... | 238 |
| Quirk v. Thomas..... | 325 | Turgeon v. The King..... | 412 |
| Quebec, Montreal & Southern Ry. Co. v. The King..... | 68 | Union Bank of Canada v. A. McKillop..... | 373 |
| Recher v. North British & M. Insee. Co..... | 447 | Union of London & Smith's Bank v. Wasserberg..... | 239 |
| Reid v. Cupper..... | 328 | United Buildings Corporation v. Vancouver..... | 331 |
| Ricketts v. Tilling..... | 321 | Vaiani v. Ruglioni De Virte..... | 359 |
| Roberts v. Marsh..... | 230 | Vivian & Co. v. Clergue..... | 371 |
| Robin Electric Lamp Co., In re..... | 356 | Wakefield v. Duckworth..... | 235 |
| Robinson v. Continental Insurance Co..... | 233 | Weightman Astle v. Wainwright..... | 440 |
| Robinson v. Smith..... | 324 | Whittaker v. London County Council..... | 368 |
| Robson v. Premier Oil & Pipe Line Co..... | 361 | Wiffen v. Bailey, In..... | 299 |
| Roper v. Commissioners of His Majesty's Works..... | 231 | Wilkins v. Weaver..... | 487 |
| Roseoe v. Winder..... | 237 | Williams v. Jenkins, In re Jenkins..... | 235 |
| Rowland v. City of Edmonton..... | 150 | Williams v. Moss' Empires..... | 446 |
| Rubber & Produce Investment Trust, In re..... | 297 | Willesden District Council v. Morgan..... | 243 |
| Ryan v. Oceanic Steam Navigation Co..... | 50 | Wills v. Great Western Ry..... | 234 |
| | | Witham v. Swan, In re Swan..... | 358 |
| | | Wright v. The King..... | 65 |
| | | Wynn v. Conway..... | 228 |
| | | Young v. Smith..... | 334 |

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VOL. LI.

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No. 1

ALIEN ENEMIES IN PUBLIC POSITIONS.

There has been much said during the past month about a very simple matter connected with the University of Toronto, which in some other countries would have been settled in short order; but men of our nation are proverbially slow in comprehension as well as deliberate in action. There is the additional feature that the parties concerned look at the situation through the mist of a class prejudice, which has distorted the landscape. Book learning, without the friction of everyday affairs, often dims the vision of scholastics who dwell together and naturally look at things from a one-sided point of view.

There have been on the staff of the University of Toronto several professors of German birth and education. These men are still subjects of Kaiser Wilhelm II., owe allegiance to him and to their native country, and declined to change such allegiance, even, indeed, if as Germans they could do so, by becoming naturalized British subjects. Their King and their compatriots have attacked us, and we are now fighting a bitter fight, à l'outrance, for the very existence of the British Empire, against a strong, resolute, relentless and ruthless enemy that for over twenty years has been plotting, preparing and praying for our humiliation and destruction. These three alien enemies, like the rest of their countrymen, have presumably been taught to hate and despise England and her people. It has, moreover, been instilled into the German people as part of their education that lying, deceit and treacherous espionage are virtues when used for the downfall of the hated rival that blocks the way to their cherished ambition of world dominion.

We have no means of assuring ourselves whether these professors, or any other Germans for that matter, are in any way

different in their mental attitude in this regard to others who have gone through the same training. All we know is that they are aliens, and, nationally, enemies; and bitter experience has proved that no reliance can be placed on the word or honour of a German when the welfare of his country is at stake. The truth is that during the continuance of this war it is not desirable to have alien enemies in the country at all. It is common knowledge that there are too many spies and traitors among them and the spy system of Germany has been England's greatest danger and difficulty.

Everyone knows now that the Secret Service department of Germany, in its scope and efficiency, is the most perfect system that the world has ever seen. It has spies in every country. They are to be found in every business and every walk of life. Newspapers and writers are subsidized to influence public opinion, and, to this end, appropriate agents have been found in private homes, in schools, in Universities, in shops and factories, and in fact everywhere where good work can be done. These agents, naturally, do not tell people what their mission is, and the more harmless and friendly they seem to be, the better they serve their master at Berlin.

A comprehension of all this is necessary for a proper understanding of the University situation. Several of the governors, having some such thoughts as these in mind, wisely and properly desired that these three German professors should be asked to resign or should be removed, at least during the continuance of the war. Notable among these governors was Sir Edmund Osler, one of the nominees, on the Board, of the Ontario Government. Apparently a compromise was arrived at, the majority of the Board deciding that these professors should have leave of absence to the end of the session; but that their salaries should, nevertheless, continue to be paid them. Sir Edmund Osler (and others) very properly objected to this, and, as his protest was voted down, resigned his seat on the Board. He realized the danger of the situation and acted promptly. And here, by way of illustration as to possible or probable dangers in these days from

the employment of alien enemies of the German race, let us suppose that one of those who supported President Faleoner, say Sir Byron Walker, a keen business man, was in charge of the Ross Rifle Factory, or some gunpowder works, or any of the great public utilities—would he dare to retain in his employ a German workman, a subject of the Kaiser, no matter how efficient he might be, or how harmless he might appear to be? We trow not!

Not less objectionable, and for analogous reasons, is the retention of German professors or lecturers on the University staff. It serves nothing to say that they are not at present to be engaged in teaching. The very fact of their retention on the salaried staff, in the employment of and paid by the province, will be regarded by the public, and above all by the youth of the University, as a tacit assertion by the Governors of the harmless character of such men, and that they ought not to be regarded as alien enemies.

Turning now to the legal question. It was strongly urged by the President and others that the Royal Proclamation published in the *Canada Gazette* of August 15th and the subsequent explanatory public notice dated September 2nd, emanating from the Governor General at Ottawa, stood in the way of the dismissal of these men. The recital of the proclamation says:—

“And whereas there are many immigrants of German nationality quietly pursuing their usual avocations in various parts of Canada, and it is desirable that such persons should continue in such avocations without interruption.”

The enacting clause provides that “such persons so long as they quietly pursue their ordinary avocations shall not be arrested, detained or interfered with, unless there is reasonable ground to believe that they are engaged in espionage, or attempting to engage in acts of a hostile nature, or to give information to the enemy, or unless they otherwise contravene any law, order in council or proclamation.”

The public notice or explanatory proclamation of September 2 directs as follows:—

“That all persons in Canada of German or Austro-Hun-

garian nationality, so long as they quietly pursue their ordinary avocations, be allowed to continue to enjoy the protection of the law and be accorded the respect and consideration due to peaceful and law-abiding citizens; and that they be not arrested, detained or interfered with, unless there is reasonable ground to believe that they are engaged in espionage, or engaging or attempting to engage in acts of a hostile nature, or are giving or attempting to give information to the enemy, or unless they otherwise contravene any law, order in council or proclamation."

It is difficult to understand how any one could contend that these provisions in any way touch upon rights as between master and servant; manifestly they are not aimed at any such relation. Clearly what was intended was that the personal liberty of Germans or Austrians should not be affected by reason of their being alien enemies so long as they behaved in a peaceful, law-abiding manner. The use of the words "it is desirable that such persons should continue in such avocations without interruption" surely could not give an alien, or even a naturalized German or Austrian, rights which could not be claimed by a native born British subject.

The question, therefore, which the Governors ought to have considered is—was it or was it not desirable or right, as a matter of public policy, in the interests of the University to retain such alien enemies, as Germans have shewn themselves to be (or, at this time, even naturalized Germans, for naturalization is a disguise frequently assumed by spies) on the teaching staff, or in the paid employment of the Province. We think that the answer of the country at all events will be overwhelmingly in the negative. There is too much reason to believe that the Governors, or those of them who control the proceedings of the Board, have been influenced less by considerations of this kind than by the social, personal or academic relations between themselves and the professors or others of their nationality. And more than that; there are those who assert that, as to some of the students, there is not that strong British feeling that one would

expect to find in a Canadian University. Has the poison of Prussian thought anything to do with this?

In connection with this branch of the subject it is of interest to note that in the Ontario Public Schools Act (and the same law exists in other provinces) it is provided that: "Subject to the regulations, any *British subject* of good moral character and physically fit to perform the duties of a teacher and who passes the examination prescribed by the regulations, may be awarded a certificate of qualification as a teacher according to the regulations."

This provision shews the mind of the legislature on the subject. If this national safe-guard is desirable for those who instruct children at our public schools it is even more desirable as to those who mould the minds of students attending our Universities who will shortly take their place as trained subjects of the Empire.

If a professorship or lectureship is an "office" (which, as regards the former at all events, may well be contended—inasmuch as a professor in the faculty of Arts in the University is a statutory member of the Senate) the University Act, R.S.O. c. 279, s. 41, and the provisions of the Naturalization Act, R.S.C., 1906, c. 77, are worthy of consideration. Sections 4 and 5, like those of the Aliens Real Property Act (R.S.O., 1914, c. 108), deal with the rights of aliens in respect of real and personal property. But s. 6 enacts that nothing in ss. 4 and 5 shall qualify an alien for any office or for any municipal, parliamentary or other franchise, or to be the owner of a British ship, nor shall anything therein entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of property as are by the Act expressly conferred upon him. The case of *Weir v. Matheson*, 11 Grant, p. 383, and on appeal, 3 Grant's E. & A. Rep., p. 123, may be referred to.

It is provided by s. 31 (b) (i) of the University Act, that no professor can be dismissed except upon the recommendation of the President, and he, it is said, has declined to act without instructions from the Ontario Government on the ground that it is

their business to lay down their policy on the subject, and that it would be unfair to dismiss German alien enemies from the University and retain those who are in other Government situations. The Premier has, however, said that the matter must be dealt with by the Board of Governors and the President. This apparent deadlock is very unsatisfactory to the public.

It is not easy to see how the Board of Governors can shelter themselves behind the section referred to, which had not in view such a state of things as now exists, and which was, it might be thought, plainly pointed at the academic qualifications and personal and moral character of a professor, of which the President who nominated him was better qualified to judge than a Board of lay Governors.

The President is also reported to have said, in connection with this subject, "We must have teachers." Under present circumstances we are prepared to deny the proposition. Canada can do without teachers for a few months. It is a matter of no importance whatever, during this war for our national existence, whether there are any teachers in the University, or indeed whether there is or is not a University at all, unless, indeed, it be used as a recruiting centre. Rather let the buildings be turned into barracks and the campus into a parade ground where the President and professors would teach their students the rudiments, at least, of military training, and so fit them to fight for their hearths and homes, for the existence of the Empire, and for freedom and liberty the world over. Much more than this is being done at Oxford and Cambridge, where several colleges are empty and some turned into hospitals, the majority of the students being at the front, or training to go there. What is good enough for these great historic centres of learning is certainly good enough for the University of Toronto, and this the President and Governors will find soon enough when they apply to the public to pay their present and their continually increasing deficits.

Since the above was written one of these professors, in view of the awkward position in which he found himself, applied for, and has been granted, naturalization papers. The learned judge who heard the case decided that he had successfully met, what he termed, the "highest test" by his declaration that "he wished success to the allies in this war." It will probably occur to others, as it does to us, that this was a very simple and easy thing to say; but, taken with other circumstances known to the public, it fails to satisfy the public. And after all the burden of proof is on the alien enemy who, in war time, seeks the privilege of naturalization in the country which his native land is attacking.

It has been said by disinterested and thoughtful writers that when an alien takes up his residence in a foreign country, intending to enjoy the protection of its laws, and to obtain his livelihood there, he should become, both legally and loyally, a citizen of that country, with full honesty of purpose. Some, however, may not see this obligation, and desire to be free to return at any time to their native land, their hearts being there and perhaps hoping to live there again. Their declining to be naturalized in the foreign country is sufficient evidence and the most convincing proof of this desire.

In the case before us there seems to have been a deathbed repentance in this respect, but it came too late, and leads to the natural assumption that the professor saw the danger of losing his job by remaining an alien enemy and so made this tardy application. The receipt of a "scrap of paper" from a judge does not effect a change of heart nor transform the recipient into a loyal British subject. We cannot, therefore, concur with the learned judge's ruling. The "highest test," which he said had been successfully met is, under the circumstances, no test at all; it is simply a declaration that the applicant was anxious, for personal reasons, to retain his position. We do not want that class of citizens in war time. In times of peace it is of little consequence.

May we also be permitted, with all respect, to make a further criticism. The learned judge is reported to have said that he

consulted some of the judges at Osgoode Hall and they thought the applicant ought to have his papers. We think the great majority of the public, to say nothing of ourselves, think otherwise. We are glad to bow to the views of our judges on legal propositions, but this is not a matter of law, but of fact—something for the consideration of a jury rather than of a judge. As law-abiding citizens we, of course, recognize that this professor is now a naturalized British subject; but—nothing more. A coat of whitewash does not change the material underneath.

We are told that the two other professors have at length resigned their positions in the University. It would have been more to their credit if they had done so before being forced out by the pressure of public opinion.

The conclusion from all this would seem to be (1) That no alien enemy should be naturalized in a country with which his native land is at war. (2) That in all branches of public service (Universities perhaps being the most important, as they are the training ground for future citizens), no public servant, professor or teacher should be appointed who is not a native-born British subject, or one who has been naturalized before his appointment and in a time of peace.

ONTARIO BAR ASSOCIATION.

The Council of the Ontario Bar Association promises an excellent programme for its next meeting, to be held at Osgoode Hall, Toronto on Wednesday and Thursday, January 6th and 7th. The profession are asked to keep these days free and by their presence help to make the meeting successful.

The circular issued by the Council and sent to the members of the profession in the Province of Ontario and otherwise widely circulated, gives full information as to various matters which are expected to occupy the attention of the association.

Amongst these we notice en passant, one, which, though but

of little general interest, may now be briefly referred to as it appertains to the field of legal journalism. It is as to the naming of a certain legal journal as the "official organ" of the association, whatever that may mean. We do not suppose that the association needs the bolstering up or the assistance of any organ. It stands or falls on its own merits and has succeeded admirably well without any outside backing. Again, if its proceedings are of sufficient interest to claim the attention of the profession (which they do), would it not be more dignified and satisfactory to publish and distribute its own literature itself and in its own way. Or, if the question of expense is of counter-failing importance (which it ought not to be) why should not the literature be given to every legal journal that might be willing to publish it.

Again, from a purely journalistic standpoint, and speaking for ourselves, we should prefer not to be in a position which might (or might appear to) hamper or in any way affect one's freedom in criticizing freely any action or views which might appear to us to be unwise or not in the interests of those we seek to serve. It is quite sufficient for us to be the organ of the legal profession as a whole.

The many subjects of professional and public interest which should come, and many of which will come, before the association will doubtless be luminously treated and discussed as they arise and they will in due course be noted for the benefit of our readers and commented on as occasion may require.

PAYMENT BY A STRANGER.

FURTHER OBSERVATIONS.¹

If A. owes money to B., and B. insures A.'s life and also pays the premiums, what is the position if A. dies before he has paid the debt, and B. receives the insurance money? Does the debt still exist?

Before we discuss the cases bearing on this question it will be well to state a few general propositions relating to the present law concerning the contract of insurance.

By reason of the provisions of the Imperial Life Assurance Act, 1774,² and the Marine Insurance Act, 1906,³ a contract of insurance is not binding on the parties unless the insured has an interest in the event insured against; but in the case of a contract of life insurance, it is sufficient if the interest exists at the time of the making of the contract, though it may cease to exist in whole or in part; and the whole amount agreed to be paid, not exceeding the value of the interest at the date of the contract, may be recovered.⁴ This is often expressed by saying that a contract of life insurance is not a contract of indemnity.

It has long been settled that a creditor has an interest in the life of his debtor.⁵

It must, however, be borne in mind that the contract of life insurance was treated as a contract of indemnity till the year 1854, and that the provisions of the Life Assurance Act, 1774, were not extended to Ireland till 1866, when the Life Insurance (Ireland) Act, 1866,⁶ was passed.

In *Ex parte Andrews*, 1816,⁷ S. E. was indebted to each of

1. The previous article appeared in Vol. 48, p. 513.

2. 14 Geo. III. c. 48.

3. 6 Edw. VII. c. 41.

4. *Dalby v. India and London Life Assurance Co.*, 1854, 15 C.B. 365; 139 E.R., 465; and *Laird v. London Indisputable Life Policy Co.*, 1855 1 K. & J. 223; 69 E.R. 439.

5. *Godsall v. Boldero* (1807), 9 East, 72; 103 E.R. 500. See A Digest of English Civil Law, edited by Mr. Edward Jenks, Book II, Part II. ss. 688, 690, and 695.

6. 29 & 30 Vict. c. 42.

7. 1 Madd. 573; 56 E.R. 210; 2 Rose 410. "E.R." refers to the English Reports.

his brothers, C. E. and T. E., and was entitled, in right of his wife, to certain property in the event of her surviving her mother. In these circumstances, two deeds were executed on the same day. They were made between S. E. and his wife of the one part, and C. E. and T. E. respectively, of the other part. By one deed S. E. assigned three-fourths of his interest to C. E., and by the other he assigned one-fourth thereof to T. E., upon trust, in the first place to reimburse themselves all costs, expenses and the like, next to retain their debts respectively, and then to pay the overplus to S. E. Subsequently C. E. and T. E. each effected a policy of insurance on the life of the wife, and, on her death, received the insurance money. A commission in bankruptcy was issued against S. E., and each brother tried to prove in the bankruptcy for his whole debt. Sir Thomas Plumer,⁸ V.C., held that the assignments had placed the brothers in the situation of trustees, and that it was extremely difficult to maintain that the trustees, being allowed their payments, were not to account for what they had received for an advantage made of property committed to them as trustees. Being enabled by the act of the bankrupt to obtain part of their debts, they could not prove the whole. The learned Vice-Chancellor, therefore, ordered each of the brothers to account for what he had received under his policy of insurance, being allowed what he had expended, including the premium.

The next case is *Humphrey v. Arabin*,⁹ 1836. J. H. obtained judgment for the sum of £3,000 against D. L., and assigned it by deed to J. I. Further D. L. executed his bond to J. I. for the payment of the sum of £800 with interest, and J. L. obtained judgment thereon. J. I., whilst he was so entitled to the said sums, effected a policy of insurance on the life of D. L. for £999 19s. 0d., and effected a further policy of insurance in the name of J. H. on the life of D. L. for £999. On the death of D. L. the sum of £1,998 19s. 0d. was paid to J. I. by the insurance company. Lord Plunket, L.C., observed: "There is no one circum-

8. Appointed Master of the Rolls in 1818.

9. 1 Ll. & Gt. Plunk. 318.

stance which puts him (the insurer) in the character of a surety for the debtor. He has no right to call on the debtor's executors to pay the debt; and it is no concern of his whether the debtor is able to pay or utterly insolvent. . . . It is clear that the creditor has no right to call upon the debtor to make the assurance, or pay any part of the expense of it, or, if the assurance company should become insolvent, to repay him any of the premiums he has paid. The debtor, on the other hand, has no right to call on the creditor to make any assurance, or to keep it alive when made; he knows not whether it has been made or not; it is a contract between other persons, with which he has no concern or privity; and I cannot find any principle or authority for holding that he should, by anything growing out of that contract, be discharged from the payment of his just debt, which he has neither discharged nor satisfied, nor caused to be discharged or satisfied." This reasoning reminds us of the maxim in Roman law "*res inter alios acta aliis neque nocere neque prodesse potest.*"

*Henson v. Blackwell*¹⁰ was decided in 1845. The wife of the plaintiff was entitled under the will of her father to one-fifth share of a moiety of an annuity of £300, and to a fifth part of a legacy of £700. By an Indenture of Assignment made between the plaintiff and his wife of the one part, and the defendant of the other part, after reciting (*inter alia*) that the plaintiff was indebted to the defendant in the sum of £300, upon a promissory note, the plaintiff and his wife, and each of them, assigned to the defendant all that the said annuity, and all and every annual or other sum or sums of money, which they were entitled to under the will, upon trust to retain the same when received in liquidation of the sum of £300, interest and certain costs and expenses. The defendant subsequently insured the life of the wife in the Norwich Union Life Assurance Office in the sum of £200, without the privity or knowledge of the plaintiff or of his wife. On the death of the wife, the defendant received the sum of £200 from the office. The plaintiff filed a bill

10. 4 Hare 434; 67 E.R. 718.

to redeem the property comprised in the assignment and prayed that the defendant might be charged with the amount he received on the policy. Sir James Wigram, V.-C., said: "The event, against the consequences of which it was his (the defendant's) interest to guard, was the death of the husband, leaving the wife surviving . . . he had a right to a guarantee against the consequences of her surviving the plaintiff. . . . The case of *Ex parte Andrews* . . . is an authority in point, . . . he (Sir Thomas Plumer) stated the law as clearly as possible in favour of the proposition contended for by the plaintiff. . . . If it had been a void policy from the beginning, he (the plaintiff) could claim nothing. . . . She (the wife) did not survive her husband. The risk intended to be guarded against was at an end; and I think that, when the risk ceased, the guarantee must be considered as satisfied." There was a decree for redemption, with a declaration that the plaintiff was not entitled to have the amount received on the policy set off against the mortgage debt.

In 1849, *Bell v. Ahearne*,¹¹ another Irish case, arose for decision. L. B., the mother of a mortgagor joined her son in a collateral bond to secure the amount of the mortgage money due to the defendant, who subsequently effected a policy of assurance on her life. L. B. died and the defendant received the insurance money. The mortgagor filed his bill to redeem the premises mortgaged to the defendant who had gone into possession, and there was a claim to have credit for the insurance money. The Right Honourable Maziere Brady, L.C., followed *Humphrey v. Arabin*, and decided against this claim.

The answer to the question put at the commencement of this article is that the debt still exists, and that B. is entitled to demand payment from the legal personal representatives of A.

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11. 12 I.E.R. 576.

*INJURIES TO STREET CAR PASSENGERS IN BOARDING AND ALIGHTING.**

Inception of Liability.—Ordinarily the relation of carrier and passenger, in so far as railways operated in city streets for the carriage of local passenger traffic is concerned, commences when a person attempts to board a car as a passenger, those in charge of the car having indicated an express or implied acceptance of him as such.

Consequently the liability of the company for injuries sustained by a passenger owing to the negligence of its employees attaches at the same instant; that is at the inception of the contract of carriage.* In this connection it must also be borne in mind that the converse of this proposition is true, viz., that until such relation is created no liability can attach. True it is sometimes difficult to determine when this relation begins, but as is said in a case in Missouri, "one test alike applies to all, and that is the relation can only be created by contract between the parties, express or implied. There must always be an offer and request to be carried on one side, and an acceptance on the other. . . . It is true that the acceptance must in many cases be implied."

So a person who is upon the street approaching a car, even though he has the intention of becoming a passenger does not, either by the mere act or intent alone, become one so as to create towards him on the part of the carrier, the obligation which the latter owes to a passenger. His status is that of a traveller to whom the company owes the same obligation which it owes to any other traveller upon the street. He is not upon the premises of the carrier, but rather upon the public highway where he may be independent of any intention to become a passenger. He has in no way become obligated to pay his fare so as to entitle the carrier to demand it or to in any way control his action. Therefore the relation of carrier and passenger not having been created the company cannot be held liable for any injury sus-

*The authorities for the propositions laid down in this article will be found in the number of the *Central Law Journal* for December 4, 1914.

tained by him before he reaches or comes in contact with the car.

Of course, in the case of a suburban railway, a different situation may exist as where it provides stations and platforms for the accommodation of intending passengers. Here the relation of carrier and passenger may arise while the person is in the station or on the platform waiting for an approaching car with the intention of boarding it. In such case the company's liability commences with the inception of the relation and not from the time of attempting to enter the conveyance.

The fact, however, that a person is upon the premises of the carrier, such as a platform provided for intending passengers, and while there awaiting the approach of a car for the purpose of taking passage, is injured, yet the company, not being an insurer, cannot from this fact alone be held liable for any injury sustained unless the evidence shews a want of proper care on its part.

Attempting to Enter Car on Wrong Side.—A carrier cannot be expected to anticipate all contingencies which may arise by attempts of passengers to improperly board a car. Here we have the application of the principle just stated, viz., that there must be an offer and acceptance to create the relation of carrier and passenger. Accidents from this cause arise more frequently from attempts of persons to board cars operated for summer traffic. During this season of the year it is the practice in many cities to use cars which are open on both sides, having a barrier on each side which is lowered or raised according to the direction in which the car is proceeding. These cars are also equipped with a running board along the side which is also similarly lowered or raised. Entrance to the car as well as exit therefrom is properly by the lowered running board.

A person is not, however, in all cases guilty of such negligence as a matter of law as will preclude recovery from the fact that he attempts to enter the car from the side opposite to that upon which the barrier is down. Circumstances may be such that the employees in charge of the car may, after notice of the

fact that a person is so attempting to enter, be guilty of such negligence as to render the questions of negligence and contributory negligence ones for the jury to determine.

Similarly where a boy was in the habit of entering the car at the front end on the side next to a parallel track and while waiting for that purpose the motorman of an approaching car which had slowed up said "get on kid," and as he had one foot on the step, the car suddenly started, throwing him to the pavement, the case was held to be one for the jury.

While this may be true, yet it would seem, and is undoubtedly the law, that where the company has no notice of such contemplated action by one intending to become a passenger it will not be liable for any injury sustained by a person attempting to board a car in this manner.

Starting a Car While Boarding.—Many injuries are sustained by passengers owing to the sudden starting of a car while attempting to board it. It is a common practice for those in charge to start not only before a passenger has become seated, but generally before he has actually entered the car and frequently as he is in the act of stepping upon the platform thereof. While it is undoubtedly true that as a general proposition it is not negligence *per se* to start before a passenger is seated, yet there are without question circumstances which would render the company liable for such a course of action if injury results. Thus this would be the case where the passenger may be so infirm by reason of infancy, old age, sickness, lameness or other cause that the carrier is chargeable with notice of such infirmity and of the consequent result of what the ordinary movement of the car would be if such person were not seated.

It would of course not be practicable to require that in all cases a street car should remain still until a passenger has become seated but "there are instances in which a car should be permitted to remain still until the passenger is seated; that is, where the passenger is old, feeble, crippled or in any condition which makes it reasonably apparent to those in charge of the car that the person needs unusual care and precaution for his or her protection."

Similarly a violent start before passengers are seated of such force as to throw and injure them will render the company liable.

Aside from this class of cases there is also that of persons who are injured by the sudden starting of the car while in the act of boarding. In cities of any considerable size it continually occurs that, at certain hours of the day, there are places where several persons are waiting with the intention of entering the conveyance. Under such circumstances it is the duty of those in charge of the car (this duty is usually imposed upon the conductor since he is the one who gives the starting signal), to take notice of the fact that people are so waiting, an indication by some one or more having been given of a desire to take passage, and to observe whether all who have such an intention and are apparently carrying it into effect, are in a position of safety. If regardless thereof and while a person is so boarding the car and is in a position of danger it is considered an act of negligence on the part of the company for the motorman to suddenly and violently start the car of his own volition or for the conductor to give the signal to start in pursuance of which the motorman acts. A reasonable opportunity for intending passengers to board the car must be given, whether they are boarding the car at a regular stopping point or at a place other than that when the stop is made in response to a signal. On the other hand it is essential in order to render the company liable that those in control of the car must have notice or reasonable means of notice of an intention to board the car.

Boarding Moving Car.—The rule as generally stated is that it is not negligence *per se* for a person to board a moving car, but that the question of negligence is one for the jury. In determining the liability of a street railway company for injuries received by a person in attempting to board a moving car any one or more of several elements may be controlling. Of course the fact that the car was moving may be some evidence of negligence. The rate of speed at which it was moving is one of the most important considerations. If moving at a rapid rate then

it might be, and it would seem that it should be, regarded as negligence, *per se*, for one to attempt to board it. It is impossible to draw any uniform dividing line, however, between different rates so as to create an absence of negligence on the one side and an existence thereof on the other, since there are always other elements to be considered. Among these are the physical condition of the person, whether he be vigorous and active, or, on the other hand, enfeebled or weakened by reason of age or some infirmity; the condition of the street or place at which he attempts to board the car such as whether some appreciable degree of danger is added owing to the existence of snow, ice, water, excavations, obstructions and the like; the fact of his being encumbered to a considerable extent with bundles or packages so as to impede the free exercise of his physical powers; a considerable number of persons on the platform or steps; thus rendering it difficult to obtain a position of safety; and standing forth most prominently of all in every case is the fact of whether there was any express or implied invitation to board the car so as to create the relation of carrier and passenger. In view of some one or more of these elements must the question of negligence be determined. In this connection it is also to be noted that in cities of any considerable size it is a frequent if not common practice to decrease the momentum of the car as it approaches a place where some intending male passenger is waiting, tacitly inviting him to board the car without bringing it to a full stop. Ordinarily with the car thus running at a slow rate of speed it would not be negligence to attempt to board it. If, however, under such circumstances a person apparently vigorous yet handicapped by some infirmity such as rheumatism, or the like, which is not apparent until he attempts to move should endeavour to board even a slow-moving car it might be regarded as negligence *per se*. And in any event the mere slackening of the rate of speed is not of itself an invitation to board the car. There must be some other indication on the part of those in charge of the car to accept such person as a passenger after being apprised in some way by

him of a desire to become one. And where only one inference can reasonably be drawn from the facts it seems that the question of negligence or no negligence may be determined by the court as one of law.

Boarding Car by Front Platform.—The fact that a person boards a car by the front platform instead of the rear one is not negligence, *per se*, there being no apparent reason why the former way is not as safe as the latter and there being furthermore no notice forbidding such an act or any objection thereto on the part of those in charge of the car.

In fact, in many cases it is a common practice for passengers to enter a car either at the front or rear end and frequently even, though there may be gates upon the front platform which are closed upon both sides, an express invitation to enter by the front platform is extended to intending passengers by the act of the motorman in opening the gate on the proper side for the entrance of persons, thus accepting them as passengers and creating the contract relation between them and the company. Aside from this, however, in the absence of any express affirmative act on the part of the motorman a person attempting to so board a car is not guilty of negligence, *per se*, the car having stopped, if the motorman ought in the proper discharge of his duty to have been aware of his presence. Thus it has been held proper to refuse to grant request to instruct that "the defendant is not chargeable with negligence if the motorman started the car while the plaintiff was attempting to board it by the front platform, if he was not aware of the plaintiff's presence there." The court said: "This request was properly refused; it is seen at a glance that the request limits defendant's liability to the knowledge of the motorman, thus entirely excluding any consideration of the circumstances which tended to shew that if the motorman had properly discharged his duty he ought to have known of plaintiff's presence. Such rule, if adopted, would have permitted the motorman to have been guilty of gross dereliction of duty, whereby he placed it beyond his power of being cognizant of plaintiff's presence, and then allege such neg-

ligence as a defence, because thereby he was deprived of knowledge of plaintiff's presence at the car."

If, however, the car is moving when a person attempts to board it by the front platform, it seems that he may be held to a greater degree of care than if he had attempted to enter it under the same condition from the rear.

—*Central Law Journal.*

JAPANESE COURTS.

BY HON. GEORGE W. WICKERSHAM,

Formerly Attorney-General of the United States.

Shortly before leaving Washington one of the Federal judges said to me, "When you are in Japan, you will, of course, visit the courts. After you have done so, write out an account of just what you see. I have often wondered how the procedure in those courts would impress an American, especially a lawyer, accustomed to our judicial tribunals."

During my visit to Tokio, I spent a morning in the imperial law courts, and, remembering what my judicial friend at home suggested, it occurs to me that your readers may be interested in a description of what I saw and heard and in my impressions of a very brief inspection of the courts in action.

AN AUDIENCE WITH THE CHIEF JUSTICE.

Mr. T. Miyaoka, former Vice Minister of Foreign Affairs, and now one of the leading attorneys of the Empire, called upon me at the Imperial Hotel, shortly before 10 o'clock in the morning, and escorted me to the courthouse. This is a very large brick building, three stories high, looking much like the courthouses in a number of our American cities. The corridors, with the court attendants here and there, the lawyers hurrying to and fro carrying portfolios, sometimes followed by clerks bearing books or documents; the wandering crowds of idlers or witnesses or suitors—all presented an appearance familiar to those who have to do with courts in our own land.

We went first to the office of the Attorney-General, a functionary who is merely the principal Crown prosecutor, all the administrative functions which in America are devolved upon the Attorney-General being here vested in the Minister of Justice. The Attorney-General received us pleasantly, but unfortunately he spoke no English, and I could exchange views with him only through the medium of my friend, Mr. Miyaoka, who speaks English with perfect fluency. The Attorney-General then escorted us to the chambers of Mr. Yokota, the presiding judge of the Supreme Court of the Empire, and the highest judicial officer in Japan. This court, which is properly known as the Court of Cassation, is composed of twenty-four justices, who sit in divisional courts of five justices each, to which cases are carried on appeal from lower courts, for review of errors of law only. The court sits *en banc* in certain exceptional cases of grave importance only. Chief Justice Yokota received us most cordially. He spoke no English, but was familiar with German, having studied jurisprudence in Germany. The judicial system of Japan is modelled on that of Germany, and a number of the judges have been educated in that country. Tea—the inevitable tea, which accompanies all ceremonies, from a shopping visit to a formal call upon high officials—was served, and after a chat about the differences between the judicial systems of Japan and the United States, the chief justice told me that, unfortunately, no branch of his court was in session, but that a number of the intermediate courts of appeal and the district courts were then sitting, and that he would accompany us in a visit to them. He added that it had been a long time since he had been in any of those courts, and that he would enjoy seeing them once more.

FACING THE ORNAMENTAL JUDGES.

So we left his room—a large, scantily, almost shabbily, furnished apartment—and proceeded to one of the intermediate courts of appeal, where some fifty or sixty of the rioters who picked up a row in Kioto a few weeks ago—and incidentally brought about the fall of the last ministry—were being retried.

They had been tried in the district court, and appeals taken from the judgments, both by the defendants who were convicted, and by the government, as to some of those who were acquitted, to this court of appeal, in which the case was being heard *de novo*. We entered by the door from the judge's consultation room, and took seats behind the judges. They took no notice of our entry, but proceeded with the business in hand. The room was a rather large apartment, severely plain in its furnishings, and arranged quite like one of our own court rooms. The three judges sat in a row on a platform, raised about two feet above the floor, and at their right, a little apart from them, also on the bench sat the Crown prosecutor, while the clerk who was taking note of the proceedings sat on the left. The judges wore black gowns ornamented with a sort of embroidered cape, or yoke, of red braid, and a species of liberty cap with tabs of black crepe behind. The barristers wore the same style of gown, ornamented with white braid in a fashion similar to that of the judges, and the same sort of cap.

There were some fifty defendants seated on benches directly in front of the judges, and behind them their counsel, behind whom again was the usual crowd of court spectators. In the Japanese courts there are no juries, and all questions are asked by the presiding judge. Counsel for either side may suggest to the court the putting of a particular question, but the court may accept the suggestion or not, as it sees fit. When we entered, the presiding judge was calling the defendants for identification. Each man, as his name was pronounced, arose and replied to questions as to his age, residence, occupation, etc. Many of the defendants were students, and it was evidently the old story of turbulent youth in conflict with established institutions. Many of them had fine faces, and they arose and stood with quiet dignity as they answered the judge. Their rioting was intended as a protest against the increase of taxation to maintain the military establishment only, and a warning to the government that the limit of burden upon a poor, patient, and industrious people had been reached. I should like to have followed the whole

course of their retrial, but time did not permit, and we left them to visit one of the district courts, where a defendant was being tried for larceny.

IN A BUSINESSLIKE ATMOSPHERE.

Again we found three judges, the Crown prosecutor, and the reporter, and the same arrangement as in the appellate court. The defendant was testifying in his own behalf. He stood directly in front of the presiding judge, not ten feet distant from him, and answered his questions in a clear voice, without any apparent hesitation. The judge seemed conversant with the case, for he put questions rapidly, giving a funny little grunt of acquiescence after every answer. Occasionally one of the associates wrote a suggestion and handed it to the president, and once or twice the defendant's counsel asked the court to put a certain inquiry. The whole proceeding—and the same may be said of those in several other courts I visited—was conducted in a quiet, colloquial way. In every instance I was impressed with the simple businesslike atmosphere. The judges were proceeding without any fuss; the counsel while respectful in manner, were very direct and easy in speech, making but few suggestions, and the whole burden of conducting the case seemed to fall on the presiding judge, even his associates seldom interfering.

Some of the Japanese lawyers with whom I have talked say that they feel that very often the court does not elicit all the facts, and that our system of having witnesses questioned by counsel would be better; but, on the other hand, some lawyers maintain that better results are realised by the system, which puts upon the court the duty of getting at the truth, maintaining that the witnesses are more apt to talk frankly to the court than to the lawyer for the opposite side who is engaged, as they think, in trying to make them out liars. Of course, as I could not understand the language, I could only get a general impression derived from closely scanning the faces and the manner of the participants in the trials. In all of the eight or ten courts

visited during the day, the same atmosphere prevailed, and so far as I could judge the court was patiently, impartially, and quietly probing the witnesses produced and finding out what they had to tell about the transaction in question. After the evidence is all in, and counsel have summed up, the court deliberates and agrees upon its judgment, which must be formulated in definite written findings of fact, followed by a statement of the legal conclusions resulting from them.

THE SYSTEM'S MERITS AND DEFECTS.

The judges whom I saw were worthy young men. They are appointed for life, but they receive small salaries, and I am told that many of them after eight or ten years' service on the bench resign and take up the practice of the law for which their judicial experience is considered as especially fitting them. The work of the bar is largely litigation, as, it seems, the people in Japan have not yet formed the habit of taking advice of counsel with regard to questions of law before getting into lawsuits. In one of the courts, the lawyers representing both sides were standing before the court as we entered, and after a general colloquy with the presiding judge lasting a few moments they bowed and retired. "It is a suit against a corporation for breach of some technical provision of the law," explained my companion, "and the counsel for the defendant wishes time to make sure what he shall say about it, and the judge, he says, 'Yes, you may take some short time for that purpose.'" "I have heard of similar incidents in our American procedure," I replied. "When you don't know quite what defence to make, you ask for delay." Human nature is the same, despite differences of race, creed, and language, and courts of all civilized countries have much in common. I came away quite favourably impressed with what I saw, and wondering whether, on the whole, in 95 per cent. of the cases, a decision by three judges, trained in the investigation of facts, would not be as nearly right as the verdict of twelve citizens casually gathered in from the general community.

I hear, and read in the English newspapers published in Japan, the complaint that in criminal cases the judges of the trial courts are too much influenced by the reports of the examining magistrates, or judges d'instruction, and that if the *procès d'instruction* develops evidence strongly adverse to the prisoner, it is almost impossible for him to escape conviction on trial. The instruction is, of course, *ex parte*, and a case may readily be built up against a prisoner, which on trial would not stand the test of cross-examination. But just here comes in the weakness of the Japanese system. There is no cross-examination, except such as the court chooses to adopt, and hence an impression of guilt derived from reading the record of the *procès d'instruction* may well determine the course of the presiding judge in adopting or refusing to put a suggested line of questioning to a witness. I do not pretend, however, to have formed any definite opinions concerning Japanese legal procedure from one day spent in their courts, but it has occurred to me that possibly an account of my visit might interest some of your readers.—*Case and Comment.*

We are told that Lord Haldane will probably resign from the British Cabinet. The public do not appear to be satisfied that he has those strong views in reference to the war between Germany and England, that is desirable at the present crisis. The evidence so far seems to run in that direction. These are not days that any flabby, am-not-quite-sure views of Germany's past and present attitude, and the needs of the British Empire are desirable in those occupying prominent positions in the Government. What is wanted in these days is the strong, robust British feeling and intelligent apprehension of things displayed by such patriotic imperialists as Lord Roberts in England, or the late Colonel O'Brien in Canada. These are the kind of men that should be prominent in days like these.

REVIEW OF CURRENT ENGLISH CASES.

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TRUST—RESULTING TRUST—FUND RAISED BY SUBSCRIPTION FOR
SPECIAL OBJECT — SURPLUS — RESULTING TRUST FOR SUB-
SCRIBERS—RULE IN CLAYTON'S CASE.

In re British R.C.B. Fund, British Red Cross Society v. Johnson (1914), 2 Ch. 419. In this case a fund was raised by subscription for the relief of the sick and wounded in the Balkan war. The fund was applied as far as required and a surplus remained which admittedly belonged to the subscribers by way of resulting trust. The question was how it was divisible. On behalf of some of the subscribers it was claimed, that the rule in *Clayton's case*, 1 Mer. 572, 608, applied, and that, having regard to the way the fund had been applied, the money now on hand must be treated as derived from subscriptions received after November 8, 1912, and belonged to the subscribers who had subscribed after that date. But Astbury, J., held that the rule in *Clayton's Case* had no application to the present case and that the balance belonged to all of the subscribers in the proportion of the amounts respectively subscribed by them.

WILL—LEGACY—ADEMPTION—BEQUEST FOR PURCHASE OF LAND
FOR BENEFIT OF PARISH—SUBSEQUENT PURCHASE OF LAND
FOR LIKE PURPOSE—SUBSEQUENT CONFIRMATION OF WILL BY
CODICIL.

In re Aynsley Kyrle v. Turner (1914), 2 Ch. 422. In this case the question was whether a certain legacy in a will had been adeemed. The facts were that the testator, by his will, dated 31 December, 1904, bequeathed a legacy of £500 to trustees on trust to purchase land in Madley to be used as a glebe for the vicarage of the parish church of Madley, and declared that he made the bequest in pursuance of the expressed wish of his wife. His wife died in 1896, and he had told the vicar of the parish that he intended to do something for the parish in her memory, and that she would have liked best that it should be a gift of a piece of land known as St. Mary's Meadow. In 1905, the vicar, having heard that this meadow was for sale, informed the testator, and he purchased it for £375 and conveyed it to trustees for the parish in augmentation of the endowment, the deed reciting that the testator had purchased the land for the parish in memory of

his wife. On 17 November, 1911, he made a codicil, and, without making any alteration in the above-mentioned bequest, gave certain additional legacies and otherwise confirmed his will. Joyce, J., who tried the action, considered that there was no inconsistency between the bequest, and the gift *inter vivos*, the latter being the gift of a particular piece of land which had been discussed before the will was made and might have been an act of spontaneous bounty on the part of the testator quite independent of the legacy, or of any moral obligation he might feel to fulfil his wife's request to do something for the parish; and the subsequent confirmation of the will after the gift had been made, though not of itself decisive of the question, was at all events entitled to consideration as turning the scale when there is any doubt.

COMPANY—DIRECTORS—CONTRACT WITH ANOTHER COMPANY IN WHICH A DIRECTOR HOLDS SHARES—SHARES HELD BY DIRECTOR IN TRUST—NOTICE OF IRREGULARITY—RESCISSION.

Transvaal Lands Co. v. New Belgium etc. Co. (1914), 2 Ch. 488. This was an action to set aside two transactions between the plaintiff and defendant companies, on the ground that the resolutions by which they were authorized were invalid because of the personal interest of two of the directors in the subject matter of the transactions. The articles of the plaintiff company provided that "no contract or arrangement entered into on behalf of the company with any directors, or any firm of which a director is a member, shall be avoided, nor shall such directors be liable to account to the company for any profit realized by any contract or work by reason of such directors holding that office or of the fiduciary relation thereby established, provided he discloses the nature of his interest; but no director shall vote in respect of any contract in which he is concerned." The transactions in question were, (1) a contract by the plaintiff company to buy certain shares of a third company held by the defendant company; and (2) a contract to sell certain forfeited shares of the plaintiff company to the defendant company. Two of the directors of the plaintiff company were also directors of the defendant company. One of them (Samuel) did not vote as "being a director" of the defendant company. The other (Harvey), who held shares in the defendant company in trust for his wife and another, did vote in favour of the resolutions, and without his vote there would have been no quorum. The plaintiff company subsequently discovered that the director, Samuel, who did not vote, held about

a fifth of the shares of the defendant company, and the Court held that the defendant company had failed to establish that notice of the extent of his interest had been disclosed. The question, therefore, as stated by the Court of Appeal, was this: Can a director of a company on behalf of the company buy shares or other property from himself, or from a company in which he is pecuniarily interested? This question the Court of Appeal (Cozens-Hardy, M.R., Eady, L.J., and Pickford, J.) answer in the negative, unless the articles expressly allow it to be done. But the Court was of the opinion that the article above referred to was not wide enough to do so, and that it was immaterial that Harvey held the shares in the defendant company as trustee. Having voted for both transactions, and there not being a quorum without his vote, both transactions were declared invalid and rescinded, there being no difficulty in restoring the *status quo*. The judgment of Astbury, J., who tried the action, was therefore affirmed.

LANDLORD AND TENANT—LEASE—COVENANT TO BUILD—COVENANT TO REPAIR—COVENANT TO DELIVER UP—WAIVER OF COVENANT TO BUILD—RE-ENTRY—MEASURE OF DAMAGES.

Stephens v. Junior Army and Navy Stores (1914), 2 Ch. 516. This was an action by a lessor against lessees for breach of covenants to build and repair, and claiming a right to re-enter. The lease was dated 20 September, 1901, and the covenant to build provided that the contemplated building was to be erected on or before 1 July, 1911, and to cost not less than £2,000. The lease also contained a covenant to repair existing buildings and buildings covenanted to be erected. There were no buildings on the land and no building was erected pursuant to the covenant, but the plaintiff, after the 1 July, 1911, accepted rent, and thereby waived the covenant to build. The defendants denied the right of re-entry, and pleaded that they had tendered the rent which the plaintiff refused to accept, but they offered to determine the lease and deliver up possession, which the plaintiff refused. Joyce, J., who tried the action, gave judgment for the plaintiff for possession and for £2,000 for breach of the covenant to build. On appeal, it was contended for the defendants that the measure of damages was not £2,000, but the loss which the plaintiff had actually sustained. On the plaintiff's part it was contended that though the covenant to build was waived, the covenant to repair was in effect also a covenant to build, and that there was a continuing breach of that covenant for which the plaintiff was

entitled to £2,000 as damages. The Court of Appeal (Cozens-Hardy, M.R. and Eady, L.J., and Pickford, J.) reversed the decision of Joyce, J., holding that there being an express covenant to build, an implied covenant to build did not arise on the covenant to repair, and therefore that no right of re-entry had arisen. Consequently, so far as the claim to possession was concerned, the action was dismissed; but a reference was directed to inquire what damages the plaintiff had sustained by reason of the breach of the covenant to build, such damages to be assessed on the footing that the lease was still subsisting, and that the plaintiff had not established a right to re-entry.

VENDOR AND PURCHASER—CONTRACT—ENJOYMENT OF LIGHT—
AGREEMENT PREVENTING ACQUISITION OF RIGHT TO LIGHT—
NON-DISCLOSURE—SPECIFIC PERFORMANCE—FORCING TITLE
ON PURCHASER.

Smith v. Colbourne (1914), 2 Ch. 533. This was an action for the specific performance of a contract for the sale of land and buildings. On investigating the title, the purchaser discovered that an agreement had been made by the predecessor in title of the vendor whereby certain windows affording light to the premises had been kept open by agreement with the owner of adjoining property. This agreement had not been disclosed to the purchaser, and it was claimed that it amounted to a material mis-description of the premises of such a character as to relieve the defendant from his purchase. Astbury, J., who tried the action, gave effect to the objection and dismissed the action with costs, but the Court of Appeal (Cozens-Hardy, M.R., Eady, L.J., and Pickford, J.) reversed his decision. The contract in question was contained in a lease in which there was no mention of the windows, and the Court of Appeal held that in such circumstances there was no implied warranty that *de facto* windows were ancient lights. That the agreement which prevented the statutory period of prescription from beginning to run did not constitute an incumbrance on the property, and there was no obligation on the part of the vendor to disclose its existence. The Court, moreover, held that the title was not too doubtful to be forced on an unwilling purchaser.

EXPROPRIATION OF LAND—PAYMENT OF COMPENSATION INTO COURT—COSTS OCCASIONED BY PAYMENT INTO COURT—COSTS OF PROCEEDINGS FOR PAYMENT OUT OF COMPENSATION—LAND CLAUSES CONSOLIDATION ACT (8-9 VICT. c. 18), s. 80—(RAILWAY ACT, ONT. (R.S.O. c. 185), s. 90 (26)—RAILWAY ACT, CAN. (R.S.C. c. 37), s. 214 (5)—MUNICIPAL ACT (R.S.O. c. 192), s. 329 (4).)

In re Griggs (1914), 2 Ch. 547. In this case land had been expropriated by the predecessors of the London County Council, and the purchase money had been paid into Court under the provisions of the Land Clauses Consolidation Act, which provides that the expropriators are to pay the costs of the investment of the moneys, the payment of dividends on the investment, and of "all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants." In order to obtain payment of the money out of Court it became necessary to obtain letters of administration to two persons' estates. Astbury, J., held that the cost of obtaining such letters were part of the costs payable by the expropriators, and the Court of Appeal (Cozens-Hardy, M.R., Eady, L.J., and Pickford, J.) affirmed his decision.

SHIPPING—STEERAGE PASSENGER—CONTRACT TICKET—"FORM APPROVED BY BOARD OF TRADE"—"CONTRACT NOT TO CONTAIN ON FACE THEREOF ANY CONDITION, STIPULATION OR EXCEPTION NOT CONTAINED IN THE FORM"—QUALIFYING CONDITIONS ON BACK OF TICKET—EXCEPTION NOT APPROVED BY BOARD OF TRADE—MERCHANTS SHIPPING ACT, 1894 (57-58 VICT. c. 60), s. 320.

Ryan v. The Oceanic Steam Navigation Co. (1914), 3 K.B. 731. This and three other cases included in this report arise out of the loss of the *Titanic*. The plaintiffs were the representatives of deceased steerage passengers suing under the Fatal Accidents Act. The Merchants Shipping Act, 1894, s. 320, provides that contract tickets issued by shipowners must be in the form approved by the Board of Trade; and the Board of Trade had approved a certain form and directed that a contract ticket "shall not contain on the face thereof any condition, stipulation or exception not contained in this form." On the tickets issued to the deceased passengers there were on the back certain conditions which exempted the steamship company from liability for negligence which, as the Court found, had the effect of varying the implied obligations arising from the conditions on the face of the contract. The jury found that the defendants had been

guilty of negligence, and Bailhache, J., who tried the case, gave judgment in favour of the plaintiffs on the ground that the conditions on the back of the contract not having been approved by the Board of Trade, and being a variation of those on its face, were invalid; and his judgment was affirmed by the Court of Appeal (Williams and Kennedy, L.J., Buckley, L.J., dissenting).

NUISANCE—VARIOUS COMPANIES LAYING MAINS UNDER STREETS—
INJURY CAUSED TO MAINS OF ONE COMPANY BY BURSTING OF
THOSE OF ANOTHER—APPLICATION OF DOCTRINE OF RYLANDS
V. FLETCHER—STATUTE—TWO ACTS TO BE TAKEN AS ONE—
CONSTRUCTION.

Charing Cross Electricity Supply Co. v. Hydraulic Power Co. (1914), 3 K.B. 772. In this action, plaintiffs, an electricity supply company, and the defendants, an hydraulic power company, had under statutory powers laid their mains in the same street. The defendant company's mains burst without any negligence and injured the plaintiffs' mains, for which cause the action was brought. Scrutton, J., who tried the action, gave judgment for the plaintiffs—(1913), 3 K.B. 442—and his judgment was affirmed by the Court of Appeal (Lord Sumner, Kennedy, L.J., and Bray, J.) on the ground that the doctrine of *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, applied notwithstanding that the plaintiffs' land was occupied by licence and not under any right of property in the soil, and that in the absence of any statutory authorization of the nuisance the defendants were liable for the escape of the water from their mains. Part of the defendants' mains were laid under an Act which expressly exempted them from liability, and the rest were laid under Acts which contained no such exemption, and which declared that all of the Acts should "be read and construed together as one Act," and it was held that the effect of this provision was to take away the exemption which down to its passing the defendants had enjoyed under the former Act.

NOTICE OF APPEAL FROM JUSTICES—ACCEPTANCE OF SERVICE BY
SOLICITOR FOR RESPONDENT—"GIVING NOTICE OF SUCH
APPEAL TO THE OTHER PARTY."

Godman v. Crafton (1914), 3 K.B. 803. In this case a simple point of practice was involved. An order had been made on an appeal from a case stated by justices in the absence of any one representing the respondent, and the question was raised by the

Master of the Crown Office as to whether the respondent had been duly served with notice. The Act authorizing the appeal provided that the appellant should give "notice of such appeal to the other party." The solicitors who acted for the respondent had accepted service of the notice, and it appeared by evidence that they had authority to give such acceptance. Lord Coleridge, Avery, and Atkin, JJ., held that the service on the solicitor was sufficient, as the Act did not expressly require that the service should be personal.

ILLEGITIMATE CHILD—WILFUL NEGLECT OF CHILD—LIABILITY OF FATHER—PERSON "HAVING CUSTODY, CHARGE AND CARE"—
—CHILDREN'S ACT, 1908 (8 EDW. VII. c. 67), s. 12 (1); s. 38 (2)—(CRIMINAL CODE, s. 241.)

Liverpool Society for Prevention of Cruelty to Children v. Jones (1914), 3 K.B. 813. This was a prosecution under the Children's Act, 1908, for neglecting four children. It appeared that the children were illegitimate, and living with their father and mother; and the question raised was whether the father could be made liable under the Act. The Divisional Court (Lord Coleridge, and Avory, and Atkin, JJ.) held that the fact that their mother, who was their sole legal parent and guardian, was living in the house, did not prevent the father from having jointly with her the custody and care of the children within the meaning of the Act, so as to render him liable, if he wilfully neglected them. See Criminal Code, s. 241.

HIGHWAY—PREMISES ABUTTING ON STREET—RIGHT OF ACCESS—
ADVERTISEMENT ON WALL OF PREMISES—INTERFERENCE
WITH RIGHT—DAMAGE—INJUNCTION.

Cobb v. Saxby (1914), 3 K.B. 822. In this case the defendant set up a counter claim for relief against the plaintiff for interfering with his access to an outer wall of his premises. The facts were, that the plaintiff and defendant were owners and occupants of adjoining premises both abutting on a street, but the building of the defendant projected a short distance beyond the plaintiff's building. There was no door or opening into this side wall, but it was useful to the defendant for placing advertisements thereon. The plaintiff erected a hoarding so as to prevent the defendant from having access from the street to his wall, which was the grievance complained of. The action was tried by Rowlatt, J., who held that the defendant's right of access to the street as owner of his premises was not limited to the mere right of ingress and

egress from his premises to the street, but included a right of access to his wall (in which there was no door or opening) for the purpose of repair, or for using it as a place for advertisements. The injunction was therefore granted as prayed.

MARINE INSURANCE—RUNNING DOWN CLAUSE—DAMAGE IN CONSEQUENCE OF COLLISION.

France Fenwick & Co. v. Merchants Marine Insurance Co. (1914), 3 K.B. 827. This was an action on a policy of marine insurance whereby it was provided "if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums . . . the company will pay the assured" a certain proportion of the said sums. The facts were somewhat peculiar. The insured ship by negligent navigation collided with a vessel in front of her, causing little damage, but after this collision the other ship (by reason of attractive forces brought in play by the collision, and owing to their proximity, coupled with the wash of the propeller of the insured ship against the starboard bow of the other after the insured ship got ahead of her) came into collision with a third ship to which a large amount of damage was done, and for which the owners of the insured ship were held responsible, and they paid sums in respect of the damage so done to the third ship, which they claimed to recover in the present action; and it was held by Bailhache, J., that the collision with the third ship was a consequence of the collision of the insured ship with the other ship, within the meaning of the clause, and therefore that the defendants were liable.

INSURANCE—RE-INSURANCE—COMPROMISE BETWEEN ORIGINAL ASSURED AND ORIGINAL INSURERS—RE-INSURERS NOT ENTITLED TO BENEFIT OF COMPROMISE.

British Dominion General Ins. Co. v. Duder (1914), 3 K.B. 835. This was an action on a policy of marine re-insurance. A total loss having occurred of the vessel insured, the plaintiffs had effected a compromise with the assured, on the original policy of insurance; and the question was, whether, in the absence of any express agreement to that effect, the defendants, the re-insurers, were entitled to the benefit of that compromise; and Bailhache, J., who tried the action, held that they were not, but were liable for the full amount of the re-insurance; but that they were entitled to the benefit of any rights in respect of the abandonment

of the ship insured which they would have had if no compromise had been effected.

CRIMINAL LAW—FIRST DISCLOSURE OF CRIMINAL ACT BY ACCUSED IN CROSS-EXAMINATION AS A VOLUNTARY WITNESS IN COURT PROCEEDING — PROTECTION FROM PROSECUTION — LARCENY ACT, 1861 (24-25 VICT. c. 96), s. 85—(CANADA EVIDENCE ACT (R.S.C. c. 145), s. 5.)

The King v. Noel (1914), 3 K.B. 848. By the Larceny Act, 1861, s. 85, a person is exempt from prosecution for larceny if, previously to being charged with the offence, the accused shall have first disclosed such act on oath in consequence of any compulsory process of any Court of Law or Equity. In the present case the offence charged was first disclosed by the cross-examination of the accused as a voluntary witness in a civil proceeding, without any objection on his part; and the Court of Criminal Appeal (Ridley, Coleridge and Scrutton, JJ.) held that this disclosure had not been made in consequence of "any compulsory process" within the meaning of the Act, and consequently that the defendant was not exempt from prosecution: see the Canada Evidence Act (R.S.C. c. 145), s. 5.

PROMISSORY NOTE—NOTE GIVEN FOR GOODS SUPPLIED TO MAKERS OF NOTE—SURETY—ORAL CONTEMPORANEOUS AGREEMENT IN DEFEASANCE OF PROMISSORY NOTE—EVIDENCE.

Hitchings & Coulthurst Co. v. Northern Leather Co. (1914), 3 K.B. 907. This was an action against the makers and indorser of a promissory note. The note was given for goods supplied by the plaintiffs to the makers. The indorser set up that he made a contemporaneous oral agreement with the plaintiffs to the effect that if the goods supplied were not equal to sample he was not to be called upon to pay the note. Bailhache, J., who tried the action, held that the agreement, not being in writing, was invalid, and evidence of it therefore inadmissible.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Ont.] [Oct. 13.
CANADIAN NORTHERN ONTARIO R.W. CO. v. HOLDITCH.

Expropriation—Railway Act — Municipal plan — Severance of lots—Injurious affection—Reference back to arbitrators —R.S.C. 1906, c. 37.

For the purposes of expropriation under the Dominion Railway Act, unless lots laid out on the owner's registered plan are so united as to form one complete whole, each lot taken by the railway company is an independent, separate and complete property in itself and the owner is not entitled to compensation for injurious affection to one such lot, no part of which is taken and which is severed from the land expropriated by a railway or by land sold to another person. *Cooper-Esses v. Acton Local Board*, 14 App. Cas. 133, distinguished. Duff and Anglin, JJ., *contra*.

The owner of land adjacent to or abutting upon the street over which a railway passes is entitled, by 1 & 2 Geo. V. c. 22, s. 6, to compensation for injury to such land but the compensation can only be awarded by the Board of Railway Commissioners and is not a matter for arbitration under the Railway Act.

Held, per Duff and Anglin, JJ.:—The arbitrators appointed to value the land so expropriated are *functi officio* when their award is delivered and an appellate court has no power to remit the matter to them for further consideration. *Cedars Rapids Manufacturing Co. v. Lacoste* (1914), A.C. 569, referred to.

Appeal allowed with costs.

Armour, K.C., and Geo. F. Macdonnell, for appellants. Robert McKay, K.C., for respondent.

Ont.] NORFOLK v. ROBERTS. Oct. 14.

Municipal corporation—Undertaking with ratepayer—Non-collection of taxes—Discretion.

Held, per Idington and Anglin, JJ.:—Where there is no stat-

utory prohibition thereof it is not illegal for a municipality in the *bonâ fide* exercise of its discretion, and to carry out an undertaking with a ratepayer, to refrain from collecting the taxes levied on the latter's property over and above a fixed annual sum stipulated for.

Per Duff and Brodeur, JJ.:—A ratepayer has no status to maintain an action to compel the municipality to collect the balance of such taxes.

Judgment of the Appellate Division, 28 O.L.R. 593, affirmed.

W. N. Tilley, for the appellant. *Armour, K.C.*, for the respondent.

Que.]

HYDE v. WEBSTER.

[Oct. 13.]

Partnership—Lease—Scope of Authority—Resiliation—Form of action—Appropriate relief—Pleading—Practice.

A partnership, consisting of H. and W. which was to expire by effluxion of time on 31st December, 1912, held a lease of warehouse property in Montreal, of which the term expired on the 30th April, 1913. During the absence of H., in September, 1912, and without authority from him to do so, W. obtained a renewal of the lease for three years, from the 1st of May then following, which was repudiated by H. on his return to Montreal. In an action by H. to have the renewal lease declared null and void, there was no evidence to shew that the partnership had profited by the renewal lease at the time the action was brought.

Held (The Chief Justice and Brodeur, J., dissenting), that the plaintiff had a sufficient interest to enable him to maintain the action and obtain a declaration that the lease was not binding upon the partnership or upon himself as a member of the firm.

Per Fitzpatrick, C.J., dissenting. In the Province of Quebec distinct and consistent pleading is essential and, as the plaintiff did not bring his action to obtain relief from his obligation under the renewal lease, but merely to have that lease declared null and void, he could not, in the action as brought, have a declaration that the lease was not binding. *Forbes v. Atkinson* (Pyke, K.B., 40), referred to.

Per Brodeur, J., dissenting. As the evidence shewed that the renewal of the lease had been obtained in circumstances

where such renewal was necessary in the interests of the partnership, the partner who obtained the lease was acting within the scope of his authority as a member of the firm and the lease was valid and a subsisting asset of the partnership.

Appeal allowed with costs.

Sir Charles Fitzpatrick, C.J., and Idington, Duff, Anglin, and Brodeur, JJ.

Bench and Bar

JUDICIAL APPOINTMENTS.

James McKay, of Prince Albert, in the Province of Saskatchewan, K.C., to be a Judge of the Supreme Court of Saskatchewan, with the style and title of a Justice of the Supreme Court of Saskatchewan, vice Thomas Cooke Johnston, resigned. (December 16, 1914.)

LEEDS AND GRENVILLE LAW ASSOCIATION.

At a meeting of the Association held on December 28, 1914, resolutions were passed to place on record its great appreciation of the services to the administration of justice and the profession of Oliver Kelly Fraser, Esquire, who for over fourteen years was Local Registrar of the Supreme Court, Registrar of the Surrogate Court and Clerk of the County Court. After a bright professional career of some years he assumed these offices in his full and vigorous manhood and brought to the discharge of his duties a keen intellect, great executive ability and a high moral standpoint. He filled the offices with credit to himself and satisfaction to the public and the profession. His courtesy to the public and his kind and genial manner will long be remembered by his old friends and associates and surpassing these will be our recollection of the brave manner in which he fought against a mortal disease and in weakness and suffering was cheerful to the end. Resolutions were also passed expressing sympathy with Mrs. Fraser and the family in the great loss which they had sustained, and that the Association attend the funeral of the late Mr. Fraser in a body.

The funeral took place on Dec. 29 and was largely attended.

Obituary.

THOMAS LANGTON, K.C.

On the 10th day of December, 1914, the profession lost in Mr. Thomas Langton a man of rare abilities. He was not only a sound and accurate lawyer but a man of cultivated taste, an adept as a botanist, artist and photographer, and was moreover of a sweet and gentle disposition which made him beloved by all who had the good fortune to be on the list of his friends. He was the son of Mr. John Langton, a man who distinguished himself for many years in the public service, as the Government Auditor. He was born in 1849 and was in his 66th year at the time of his death. He was a graduate of Toronto University, receiving his degree of M.A. in 1871, was called to the Bar in 1872, and was made a Q.C. 1890. He practised for many years as a partner of Sir Oliver Mowat and the Hon. Jas. MacLennan and on their retirement became head of the firm of Mowat, Langton and MacLennan. Early in his professional career he became associated with Mr. Holmsted as co-editor of the Judicature Act and Rules, of which three editions were published. Mr. Langton was never of a very robust physique, a drawback which prevented him from essaying jury business, but before the Courts at Osgoode Hall he was heard with appreciation as a man whose law was sure to be sound. For the last eighteen months a distressing malady removed him from the sphere of active labour. Even to his recreation he could impart a philosophic turn, as may be seen from his lines on the game of golf to which he compares to the game of life, and in which may be found, mingled with a sweet seriousness, a graceful and piquant wit. To those who play the game, and can appreciate a good thing, no apology is needed for reproducing them here.

“What is thy Life? A ball! Teed smooth and clean,
In high hope driven towards the distant green,
Now topp'd, now fairly hit; and as it flies
Where hazards many are, encountering lies
That hang, and cups that baffle—should thy ball
Through fozzle or ill-fate into a bunker fall
What boots it to despond? A stroke (or more) delivered
 lustily
Will lift it scored and blacken'd though it be
To the fair green beyond.

Tho' stymies foil, and 'pull' and 'slice' combine
 To far divert it from the perfect line,
 Serenely followed through in varied loft and role
 'Twill reach (with few or many putts) the final hole.

This little *jeu d'esprit* he cleverly illustrated with his own pen, demonstrating thereby both his literary and artistic ability. Alas! for his friends the game is o'er, he played it as becometh a good golfer, in an honest and true-hearted way.

War Notes.

Our readers will appreciate the preservation in a permanent form for future reference the remarkable poem well known under the name of "The Day," by Henry Chappell, a railway porter at Bath. Nothing finer as a denunciation has ever appeared in the English language. Its appropriateness at this time is manifest to all:—

You boasted the Day, and you toasted the Day,
 And now the Day has come,
 Blasphemer, braggart, and coward all,
 Little you reck of the numbing ball,
 The blasting shell, or the "white arm's" fall,
 As they speed poor humans home.

You spied for the Day, you lied for the Day,
 And woke the Day's red spleen.
 Monster, who asked God's aid Divine,
 Then strewed His seas with the ghastly mine;
 Not all the waters of all the Rhine,
 Can wash thy foul hands clean.

You dreamed for the Day, you schemed for the Day,
 Watch how the Day will go.
 Slayer of age and youth and prime,
 Defenceless slain for never a crime,
 Thou art steeped in blood as a hog in slime,
 False friend and cowardly foe.

You have sown for the Day, you have grown for the Day,
 Yours is the harvest red.
 Can you hear the groans and the awful cries?
 Can you see the heap of slain that lies,
 And sightless turned to the flame split skies,
 The glassy eyes of the dead?

You have wronged for the Day, you have longed for the Day
That lit the awful flame.

'Tis nothing to you that hill and plain,
Yield sheaves of dead men amid the grain,
That widows mourn for their loved ones slain,
And mothers curse thy name.

But after the Day, there's a price to pay,
For the sleepers under the sod,
And He you have mocked for many a day,
Listen, and hear what He has to say,
"Vengeance is Mine, I will repay,"
What can you say to God?

The following extract from an article in an English contemporary throws light on the Prussian character and the attitude of Germany towards other nations:—

"To-day Prussia stands to the modern world in almost precisely the same position as the barbarians stood towards Rome. She is still pagan at heart; the work of the Teutonic knights evangelised only the surface of her people, who still remain, as any student of Comparative Religion can testify, the greatest repository of heathen traditions.

The 'Kultur' and ideals of her rulers and people remain to this day those of Genseric and his hordes; and 'the good old God of Prussia,' to whom the Kaiser makes frequent reference, is neither more nor less than Odin under another name. Their triumph would draw over the world a moral and intellectual night as dark as that which followed on the sinking of the sun of Rome, and all the forces of progress are vitally concerned in preventing that triumph."

Q. Why may we expect a failure in the crops next year?

A. Because in all probability there will be no Germ (—) nation.

FRANK M. FIELD, K.C.
PRESIDENT ONTARIO BAR ASSOCIATION.

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10, 11

1919

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CONTENTS

M. F. G. K.

Editorial

Constitutional Law

Editorial

Editorial

Editorial

Editorial

Editorial

Editorial

Editorial

Editorial

Editorial

Editorial

Editorial

During the past few years, we had been looking forward to a great celebration of the centenary of one of our great statesmen, and the peace between the two warring nations. The Presidential address at the conference with the words which, however, were described as peace.

The popularity of the Hague Tribunal is only to the lawyer but to the world at large. The peaceful message of the lawyer will go on until the day when war between two countries will be no more. The lawyer's elysium will be realized.

J. J. W. - P. D. K. C.

ASSOCIATION.

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No. 2

ONTARIO BAR ASSOCIATION.

PRESIDENT'S ADDRESS.

Delivered by Mr. F. M. Field, K.C., at the Eighth Annual Meeting.

We meet under extraordinary conditions; the great Empire, of which we form no inconsiderable part, is at war. Viscount Haldane, the Lord Chancellor of England, in his splendid address on "Higher Nationality" at Montreal in September, 1913, used these words:—

"In the year which is approaching a century will have passed since the United States and the people of Canada and Great Britain terminated a great war by the Peace of Ghent. . . . We should steadily direct our thoughts to how we can draw into closest harmony the nations of a race in which all of us have a common pride . . . If that be now a far-spread inclination, then indeed may the people of three great countries say to Jerusalem 'Thou shalt be built,' and to the Temple 'Thy foundations shall be laid.'"

With these noble words ringing in our ears, we had been looking forward with eagerness and enthusiasm to a celebration befitting the culmination of one hundred years of peace between the two great English-speaking nations. The Presidential address of December, 1912, concludes with these words, which, however, can scarcely now be described as prophetic:—

"The growing popularity of the Hague Tribunal is gratifying not only to the lawyer but to the world at large. . . . The peaceful message of the lawyer will go on until the ruffianism of war between two countries will be no more tolerated . . . and the lawyer's elysium will be realized.

“When the war drum beats no longer,
When the battle flag is furled
In the parliament of man,
The federation of the world.”

Happily for us the ravages of war have been, so far, remote from our borders, but, with the declaration of war on the fourth of August, the possibility of the realization of the dream of the poet has again become remote, and our plans for a peace celebration of the Anglo-Saxon communities have been shattered; not, indeed, I am glad to say, by any disturbance of that century of peace, but because our thoughts are necessarily engrossed with the conflict, the greatest that history records.

The theme of our war lyric strangely enough lays stress upon the exploits of love rather than of war, and if “Tipperary” stands for the pursuit of happiness rather than the pomp and pageantry of war, then, indeed, may we say just at this moment, “It’s a long way to Tipperary, It’s a long way to go.” However, as with Tennyson in his “Vision” and Ex-President Mikel in his prophecy, so I am sure each of us will say, “My heart’s right there.”

So much by way of assurance to our distinguished guests from across the border, whose disappointment is doubtless as keen as ours, that the celebration of the century of peace between us must be postponed; not, indeed, as I have intimated, because of any rupture of those good relations which we have striven to maintain and value so highly, but because of a little matter of more pressing concern engaging our particular attention just now.

In case the stranger within our gates on this occasion, seeing us here assembled as of yore, may entertain a doubt as to what is foremost in the work of this Association, I might recall the fact that in this very hall the call to arms was answered by even a greater rally of the Toronto Bar than we have present this morning. Then was formed the Osgoode Hall Rifle Association, in which I am proud to have been enrolled as a full private. In this very building, indeed, an indoor rifle range has been installed and regular rifle practice takes place. This military organization has been signally honoured by the Court, over which the Honour-

able Chief Justice Sir William Mulock presides, adjourning to the Armouries to witness its first review. I believe at the head of the Rifle Association is the Honourable Featherstone Osler, so long a distinguished member of the late Court of Appeal. A notable supporter of the organization is Sir Glenholme Falconbridge, Chief Justice of the King's Bench, whose encouraging sentiments have met a warm response. Only the other day Lieut.-Col. Stewart received from the hands of the Chief Justice of Ontario, the Hon. Sir William Ralph Meredith, the sword that marks his rank as Commander of the Home Guard in this great city.

At a recent meeting of the Special Committee of our Association having in charge the arrangements for the Annual Meeting, the son of the late Chief Justice of Ontario, Charles A. Moss, prominent in the profession and public life of this city, attended in khaki uniform—a badge of his enlistment as an officer in training for foreign service. Several members of our Association are in the First Canadian Expeditionary Force, and, among our officers, are sires whose sons are serving the Empire in this great war on European soil, and in both the armies and navies of Greater Britain are found sons whose fathers adorn the Bench of this Province, and of the Supreme Court of Canada, one of whom, at least, Naval Lieutenant Victor Brodeur, has been in action on His Majesty's Ship Berwick, on the occasion of the sinking of the German cruiser Spreewald, maintaining the traditions of that Navy whose boast is that its flag has braved a thousand years, the battle and the breeze.

These passing references to activities beyond the realm of law may perhaps be permitted to one like myself still on the Reserve of Officers in His Majesty's Battery of Heavy Artillery at Cobourg, of whose record at this crisis in our history I feel I can be justly proud.

However alluring the topic of war may be, and, no doubt, is, the motto in the British Empire and His Majesty's Dominions beyond the Seas is, I believe, "Business as Usual," and I therefore invite your attention to a few matters that may be deemed noteworthy in the aims, objects and achievements of the Ontario Bar Association.

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I do not hesitate to characterize our neglect of the opportunities afforded by this section of our Constitution as a disgrace to a profession, which, while doubtless conservative in the best sense of the term, ought to be and I believe is progressive. Admitting that Quebec must still be excluded from the Provinces wherein uniformity of "Law relative to Property and Civil Rights" is possible of achievement, there remains a vast territory in Canada over which such uniformity can and should prevail. Why should there be in the legislation of our Provinces pitfalls for the practitioner of a sister Province in statutes relative to Voluntary and fraudulent conveyances—Assignments and preferences by insolvents—Conveyancing and law of property—Mortgages of real estate—Conveyances, leases and mortgages—Devolution and distribution of estates—Wills—Insurance—Trustees and executors and administration of estates—Bills of sale and chattel mortgages—Conditional sales of goods—Mechanics' and wage earners' liens—Wages—Master and servant—Compensation to workmen for injuries—Property of married women—Landlord and tenant?"

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FRANK M FIELD, K.C.

PRESIDENT ONTARIO BAR ASSOCIATION.

Lab. Form. 1.

• **What is the purpose of the study?** The purpose of the study is to determine the effect of a 12-week resistance training program on the strength and endurance of the lower extremities in healthy young adults.

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1. *Journal of the American Medical Association*, 1997; 278: 1039-1044.

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Journal of Management Education 30(6)

1. *Journal of the American Medical Association*, 1997; 277: 1039-1043.

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1. *Journal of the American Medical Association*, 1997; 277: 1033-1036.

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community in general that our Province thus takes a foremost place in the world in its regard for the welfare of our artisans. We hope and believe it will prove to be a "monument more enduring than brass" to the heart and brain of the great Canadian who, regardless of the weight of years, spent much time in gathering information, exchanging ideas, and ascertaining results in Europe and America that the outcome of his labours might be worthy of his native Province. When representing our Association at the annual meeting of the New York State Bar Association in January last, I had the great satisfaction of hearing Sir William Meredith's draft bill (not then enacted into law) described by an expert as the most advanced measure of relief ever laid before the legislature of any country. It has relegated to the realm of limbo the intricacies and subtleties of the law of contributory negligence and proximate cause in the vast majority of cases that have heretofore engaged the attention of the Courts and the legal profession in that branch of law. The *Toronto Globe* of January 1st gave this statute a New Year's greeting in these terms:—

"At 12 o'clock last night the new Act to provide for compensation to workmen for injuries sustained and industrial diseases contracted in the course of their employment came into force. After years of waiting what it is hoped will be the most effective piece of social legislation of its kind in this country is now operating to protect the lives and dependents of those whose earning capacity is impaired through accidents which happen in the daily pursuit of a livelihood. Notwithstanding all the protest and argument that has been occasioned by the promulgation of the rates of assessment to be paid by employers of labour in the Province, the Act will start with an accident fund of about \$100,000."

This has been a strenuous year in the history of this Association. There have been five meetings of the Executive Council; the first, on 8th January when we were the guests of Vice-President W. J. McWhinney, K.C., at his residence; the second, on 10th February, at the University Club; the third, on 24th March, in

the Reception Room of the Parliament Buildings, where Cabinet Ministers, the Leader of the Opposition, and several members of the Legislature, were our guests; the fourth, on 19th August, at Cobourg; and the fifth on 19th November, at Dunnings Hotel, in Toronto. All of these meetings were well attended by members resident in Toronto and elsewhere. At all of these meetings not the least pleasant feature was the social part, and I cordially concur in the sentiments so well expressed by Hon. Mr. Justice Hodgins in his address as President in April, 1910:—

“There is indeed great need for a closer drawing together of the members of the Bar, not only for the sake of the common interests of our strenuous life, but also so that we may not entirely lose what is the greatest charm connected with practice of the law, the intimate companionship of congenial minds and the enjoyment of the lighter and more social side of our incomparable though jealous profession.”

During the past year the new Surrogate Court tariff of fees has been adopted, and some progress has been made with the revision of the rules relating to procedure in the Surrogate Courts. The draft of these rules as submitted to our Executive is somewhat of a disappointment, however, as the work indicated a revision without simplification. The Revised Statutes of Ontario, 1914, have come to us as a great relief, for which we are grateful.

The trial of divorce cases, which has been the subject of much debate at several of our annual meetings, was discussed in Parliament on the resolution of Mr. W. B. Northrup, K.C., M.P., “That the same should be taken into immediate consideration by the Government with a view to reform during the present session.”

Many influential members, in addition to the mover of the resolution and the Prime Minister, endorsed the resolution, but the result makes it evident, I think, that if our Courts are ever to have jurisdiction to try divorce cases, as is done in several of the Provinces, the reform must be obtained with the aid of our Legislature.

During the year, invitations were extended to our Association

to send delegates to the meetings of the New York State Bar Association at New York, the Manitoba Bar Association at Winnipeg, the American Bar Association at Washington, D.C., and the Lawyers' Club at Buffalo. Mr. W. J. McWhinney, K.C., represented us at Winnipeg, and spoke in enthusiastic terms of his reception there, where he advocated the formation of a Canadian Bar Association. Mr. E. J. Hearn, K.C., and other members of our Association, welcomed the Lawyers' Club of Buffalo in Toronto when en route to the Thousand Islands during the summer, and Mr. H. A. Burbidge of Hamilton has since represented our Association at a Club Dinner in Buffalo. I was delegated to the meetings at New York and Washington, the one at the end of January, the other at the end of October. Both of these meetings were very interesting and the hospitality unbounded. Having regard to the great numbers of the legal profession in the State of New York and the United States, one comes back from these meetings to our own, assured that, in proportion to the numbers available, our meetings are quite as well attended as theirs. The Washington meeting was very largely attended, as might have been expected, on account of the many distinguished men that could be conveniently gathered there in those delightful October days. The Honourable Sir Charles Fitzpatrick, Chief Justice of Canada, made an address on "The Constitution of Canada," in the course of which he laid stress upon our position in the Empire, which drew forth the applause of the Canadians and a sympathetic cheer from our hosts. Indeed, with the assurances received on every hand and the strains of "Tipperary" in our ears we could quite believe the Washington lady's proclamation of "boiling neutrality."

We extend a hearty welcome to the distinguished Judges and members of the Bar from the United States and from the Province of Quebec, as well as from our own Province, who have so kindly undertaken to participate in our proceedings by preparing papers and making addresses at the Annual Banquet. Their association with us at the social functions of these meetings as our guests does much to maintain that enthusiasm without which this organization cannot thrive.

In the eight years of its existence this Association has done enough to justify its organization, but let no one think that nothing remains to be done. Perfection in law and in procedure of the Courts is unattainable in a community such as ours.

“New occasions teach new duties,
Time makes ancient good uncouth;
They must upward still, and onward,
Who would keep abreast of Truth.”

In addition to our Reception Committee, whose duties began at 10 this morning and will end at 6 p.m. to-morrow, we have had Standing Committees at work throughout the year on Law Reform, Legislation, Legal Ethics, and Legal History. The reports of these Committees have been printed for distribution, and are now available.

The work of the year has been rendered very agreeable because of the earnest and able men who have served on these committees. I regard myself as most fortunate in having had such support during my term as President. I desire to thank you for the honour conferred upon me a year ago in electing me President of the Association, and to wish you, one and all, a Happy and Prosperous New Year. Whatever may happen to us individually, I am sure it will be counted a happy and prosperous year if, in the Providence of God, we shall live to see right and justice triumph in the mighty conflict in which we are engaged.

Gentlemen, in conclusion, I commend to the consideration of all of us, in this our time of trouble, those noble sentiments uttered by that great Imperialist, Benjamin Disraeli, Earl of Beaconsfield, in a notable address at Manchester forty-two years ago, as true now as then:—

“I express here my confident conviction that there never was a moment in our history when the power of England was so great and her resources so vast and inexhaustible.

“And yet, gentlemen, it is not merely our fleets and armies, our powerful artillery, our accumulated capital, and our unlimited credit on which I so much depend, as upon that unbroken spirit of her people, which I believe was never prouder of the imperial country to which they belong. Gentlemen, it is to that spirit that I, above all things, trust.”

THE DEFENCE OF THE SUEZ CANAL.

The validity of the measures which the Egyptian government recently took to clear the ports of the Suez Canal of the German merchantmen which were lying up there for refuge and impeding the ordinary commercial use of the waterway has received a further justification this week by the grave development of affairs in the Near East. The Ottoman Empire is now at war with England, and the safety of the international canal is threatened by the power which was originally designated as its protector. Turkey's place, however, as the territorial sovereign of the country through which the canal is cut, has been taken by England in virtue of her protecting function in Egypt; and it is to the English fleet and the English army now, as in 1883, at the time of the Arab rising, that the defence of the highway of nations is entrusted. Had the German ships been left in port, it is not at all unlikely that they would have chosen this moment for working mischief; and, by sinking themselves in the narrow channel, have struck a terrible blow at the world's and especially at England's commerce. But as the agents of the powers in Cairo, who are the chosen council for the protection of the canal in times of emergency, confirmed England's right to take exceptional steps against the danger that lay in the ports, so now, doubtless, they will confirm our right to ward off by all possible means the danger that moves from the desert. According to the stipulations of the Convention of Constantinople, 1888, to which Great Britain adhered in 1904: (1) no act of hostility is allowed either inside the canal or within three miles of its ports; (2) belligerents' men-of-war and their prizes may not stay longer than 24 hours, except in case of absolute necessity, within the harbours of Port Said and Suez; and (3) belligerents may not station men-of-war in these harbours. These provisions are declared to apply even if Turkey is a belligerent, and so, too, if Egypt is at war; but the most authoritative of English jurists, the late Professor Westlake, suggested that they do not prevent the power which is best able to safeguard the

freedom of the canal from taking any measures necessary to that end, even if they are not in accordance with the provisions. At the time of the Arabi revolt, England found it necessary to land troops at Ismailia to check any attempt at wrecking, and she may now have to keep her warships in the waterway and its ports and to fortify the banks. We have not protested against the American claim to fortify the entrances to the Panama Canal, because in the present weakness of treaty sanctions we recognize the need for some effective guardianship of neutralized waterways, as well as of neutralized countries. In taking whatever steps are necessary in the Suez Canal, England will be upholding public law as fully as when she went to the help of Belgium.—*Central Law Journal*.

THE ARMING OF MERCHANTMEN.

The right of a merchant ship to defend itself against capture by the enemy in time of war, and to arm itself for that purpose, has never until quite recently been doubted.

The carrying of guns for defensive purposes was a common practice in the British merchant service during the Napoleonic wars. A reminder of those days may still here and there be found in the bulwarks of sailing vessels painted white and black to represent dummy gun ports.

The vessels of the East India Company and the Hudson Bay Company were at one time specially exempted from the duty of sailing under convoy, in consideration of the sufficiency of their armament. In *James' Naval History*, some particulars may be found of the armament of three East Indiamen convoyed from the Hooghly in 1809. The "*Stratham*" and the "*Europa*," each of 800 tons register, were armed with 20 medium guns and 10 carronades. The "*Lord Keith*," of 600 tons, carried 10 or 12 guns. As late as 1855, the ships engaged in the opium trade were armed for the protection of their valuable cargo against pirates and others. Unquestioned as the right of defence for

merchantmen may have been, it was a right that had fallen into almost complete desuetude during the last century, so far as this country was concerned.

The revival of this ancient practice on the part of the British Admiralty was announced by Mr. Winston Churchill last year. The new policy was explained by him in the House of Commons, on the 17th of March last, in the following terms:—

“Forty ships have been armed so far with two 4.7 guns apiece, and by the end of 1914-15 70 ships will have been so armed. They are armed solely for defensive purposes. The guns are mounted in the stern and can only fire on a pursuer. Vessels so armed have nothing in common with merchant vessels taken over by the Admiralty and converted into commissioned auxiliary cruisers, nor are these vessels privateers or commerce destroyers in any sense. They are exclusively ships which carry food to this country. They are not allowed to fight with any ships of war. Enemies' ships of war will be dealt with by the Navy, and the instruction of these armed merchant vessels will direct them to surrender if overtaken by ships of war. They are, however, thoroughly capable of self-defence against an enemy's armed merchantman. The fact of their being so armed will probably prove an effective deterrent alone on the depredations of armed merchantmen and an effective protection for these ships and for the vital supplies that they carry.”

This new departure in British Naval Policy was received very differently in different quarters. Lord Charles Beresford declared his conviction that it was equivalent to an addition of 15 Dreadnoughts to our naval resources. Great shipping firms expressed their patriotic readiness and desire to fall in with any recommendations of the British Admiralty, but declined comment. Jurists and shipowners of neutral countries expressed themselves as unfavourable to the proposal—both as tending to enlarge the burdens and operations of naval warfare, and as contrary in spirit if not in letter to the terms of the Declaration of Paris. I have before me a bundle of letters from experts in

neutral countries, from Belgium, Holland, Norway and Sweden, who with entire unanimity express themselves as unfavourably impressed by this development of naval warfare, which indeed raises many interesting and serious problems, some of which may be solved in the course of the present war.

The resumption by private merchantmen of the use of defensive armaments, which may apparently include naval guns of any size and in any number which the shipowner or the Admiralty of his country may deem advisable, and may apparently include the strewing of mines to delay or defeat the pursuit of a hostile cruiser, might greatly aggravate the position of neutrals in future naval warfare, and the increased power of naval weapons seems to render it even more desirable to-day than in the days of the Declaration of Paris, that the use of these improved instruments of destruction should be confined to vessels officered and manned by regular officers and men trained in the observance of the complicated code which ought to regulate naval warfare.

So far no action by armed merchantmen (other than regularly commissioned auxiliary cruisers), whether for purposes of defence or offence, has been reported in the present war. It is, however, interesting to consider some of the legal questions that may arise out of their existence before this war is ended, and in *Armed Merchant Ships*, Dr. Pearce Higgins has very clearly dealt with the position in International law of armed merchant ships, their crews and cargo. These vessels must, of course, be distinguished from the auxiliary cruisers which both Germany and ourselves have converted into men of war and regularly commissioned. They may be described as "defensively armed and uncommissioned merchant ships."

The right of merchant ships to arm for self defence has, as Dr. Higgins points out, been recently denied by German jurists.

At the meeting of the Institute of International Law at Oxford last year the following rule (Article 12 of the *Manuel des lois de la Guerre Maritime*) was adopted after discussion.

“La course est interdite . . . les navires publics et les navires privés, ainsi que leur personnel ne peuvent pas se livrer à des actes d'hostilité contre l'ennemi. Il est toutefois permis aux uns et aux autres d'employer la force pour se défendre contre l'attaque d'un navire ennemi.”

Professor Triebel of Berlin opposed the latter clause on the ground that an enemy merchant ship had no right to resist capture, and since then Dr. George Schramm, legal adviser to the German Admiralty, in *Das Prisenrecht in seiner neustengestalt*, has maintained that there is no legal foundation for the rule allowing a merchant ship to defend itself, and that the crew of such a vessel unless duly enrolled in the enemy forces, would be subject to the criminal law!

The usual view is that they would become prisoners of war. and this view is expressed in the United States Naval Code, and the United States has, it is believed, expressly recognised the status of our armed merchant vessels in the last few weeks.

By the defensive arming of their ship, the crew are deprived of their right under the Eleventh Hague Convention of 1907 to be released, if captured, on a written undertaking not to engage while hostilities last, in any service connected with the operations of war.

In Dr. Higgins' view, the defensively armed merchant ship may, if attacked, lawfully capture its assailant. He does not deal with the question of whether such a vessel may lawfully assist a sister ship which is the subject of attack. Probably not, but the situation might well strain the conscience of an English merchant captain.

The position of neutral goods on board a defensively armed merchant ship, may create some difficult questions for our Prize Courts. Neutrals will obviously incur some additional risk in shipping goods by these vessels. For the law as to their position is far from clear. In almost contemporaneous decisions in 1814-1815, Lord Stowell in *The Fanny* (1 Dods. 448), and the United States Supreme Court in *The Nereide* (9 Cranch 441), expressed opposite views. Lord Stowell, dealing, it is true, with a case of a

vessel armed with 16 guns and carrying letters of marque, held that prize salvage was payable by the owners of neutral goods on board. The United States Supreme Court held that neutral goods on an enemy armed merchantman, were not liable to confiscation under American Prize Law.

Dr. Higgins expresses the view that neutral cargoes placed on merchant ships which may be converted into warships under the terms of the Hague Convention, 1907, would be liable to be condemned, while those placed on armed but uncommissioned merchant ships should, under the Declaration of Paris, be released. It is not, however, clear that the Declaration of Paris governs the matter, still less what view a German Prize Court might take of the case.

The hitherto recognised laws of naval warfare may possibly suffer some unexpected usage before the present war is brought to a conclusion.—*Law Magazine and Review*.

LAW STUDENTS AND THE BIBLE.

It is unnecessary, at this late date, to enlarge to any intelligent reader on the advantages of a thorough knowledge of the Bible to every student of the law. This subject was discussed in a recent address by President Barker, of the State University of Kentucky, to the students of the College of Law of that University. He strongly advised them to study the Bible, as being very important to them in many ways. He said: "The Bible is the foundation of modern law, and for this reason a working knowledge of it will be of much benefit to the young lawyer." The writer in the publication above referred to says: "This was good advice. It is, in a sense, unfortunate that the Bible should have become fixed in the popular mind with a wholly theological significance. For thus its legitimate claims as literature have been quite ignored. To the general reader the Bible has been more or less a sealed book, and its priceless historical, philosophical, ethical and poetic treasures have been open mainly to the often purblind sectary and religious enthusiast. In some quarters it may seem irreverent

to suggest a secularization of the Bible. Yet something of the sort seems necessary in order more widely to diffuse its educative and cultural value. The argument that doubtless availed more than any other to exclude the Bible from the public schools was that it was being used in furtherance of sectarian propagandism. But it can hardly be gainsaid that there is a distinct loss to the youth of the present day in their being denied the early knowledge of the Bible which was brought home to those of former days when the good old custom prevailed of opening school with the reading of a chapter from the Scriptures. No doubt the persistence with which in times past the Bible was forced upon the attention of the young, both in and out of school, was rooted in a narrowly religious purpose. But there were unquestionably certain valuable educative by-products in the process. One can hardly fail to see some connection between the character of Lincoln's writings and the fact that in his boyhood the Bible was one of the two or three books that were given to him to appease his voracious appetite for reading. His speeches and addresses abound with Scriptural allusions, and to the same source may be attributed that dignity and elevation of style which gave to much of his writing such matchless force and felicity. In the light of this conspicuous example law students may well be advised to read the Bible. They may not thereby acquire the style of a Lincoln—for in the last analysis 'the style is the man'—but they will add richly to their intellectual equipment, and by so much make better lawyers."

CHRISTIAN SCIENCE AND THE LAW.

The curious vagaries of this cult are referred to in *American Law Notes* in reference to a case recently brought in New York by a Christian Scientist against the Interborough Company for \$30,000 damages for pain suffered by her by reason of a fall while entering a subway station, owing, as alleged, to the negligence of the company. The question arose, but was left undecided, as to whether a Christian Scientist, who denies that there is any such

thing as pain, can recover damages for pain caused by an accident. We are told that on the witness stand the plaintiff did not refer to her fall in the subway as having given her any pain. She merely admitted that she had encountered an "error," and that, after having stopped long enough to learn the "truth," she continued on her way to church. Her husband, however, who either was not a Christian Scientist, or was alive to the worldly necessity of speaking in a language that Court and jury could understand, testified that his wife had endured much pain on account of this "error," so much so, in fact, that she had to leave church in the middle of the service and go home, where a physician attended her and did what he could to assuage the internal pains which he, as a regular medical practitioner, felt certain she must have endured. The Court sidestepped the nice question of damages for a "painless" injury, and dismissed the case on the ground that the evidence shewed no actionable negligence on the part of the defendant. It may be surmised that in this action of the Court the plaintiff will think she has encountered another "error," and take the case to a higher Court.

PEACE SOCIETIES IN WAR TIME.

The American Society for Judicial Settlement of International Disputes, having a good deal of spare time on its hands at present, and being, so to speak, largely out of business, have issued a paper by one Theodore Marburg (apparently a German, from the name) on Law and Judicial Settlement. It was published first in German, but, as we are told in a note, "it is now thought useful to reproduce it in English." It is amusing to glance at its contents in view of the present position of things. If it was useless for any useful purpose in the prevention of war when printed in German in December, 1912, it is scarcely likely to be of any value when reproduced in the beginning of 1915 in the midst of a bitter war; a war started by Germany for universal dominion, the object of which is avowedly to Germanize all nations, and so, necessarily, to do away with anything "international," and make

a lasting peace by reason of there being no other nation to quarrel with. It would be well if this society were to spend the money they put into this foolish and useless literature in buying food for the Belgians, who are now being starved to death by Germany's brutality and its breach of international obligations. These peace papers and the proceedings of peace societies, such as the above, are now a ghastly farce and a cruel joke.

In another place (post p. 70) we refer to the death and give a sketch of the life of a frequent and valued contributor to our pages, William Edward O'Brien, LL.B. Though a member of the legal fraternity he was more widely known to the public in the ways there spoken of.

Correspondence.

ROYAL BANK CASE.

SIR,—Permit me to say a few words in reply to Mr. Lefroy.

He takes exception to my saying that it was "a curious phenomenon that any astute and clear-minded lawyer should entertain the slightest doubt about either the perfect wisdom and justice of the Privy Council decision." I infer from his remarks that he entertains no doubt—he admits that it is a question that is "too high" for him. I therefore exonerate him from entertaining any doubts either as to the wisdom or the justice of the decision.

When a decision is not susceptible of attack on the score of either wisdom or justice, it is *primâ facie* right as a matter of law. For the object of all law is the attainment of justice, and as our Rule 183 puts it, that judgment may be given "according to the very right and justice" of the case.

The common law has been said by great authorities to be the perfection of common sense and has been built up by judges having a constant regard to what they believed to be (sometimes perhaps erroneously) the requirements of wisdom and justice.

Wisdom and justice must also be constantly kept in view by

the Highest Court of the Empire in the construction of statutes and all constitutional questions. When a statute can be construed in accordance with wisdom and justice surely that construction is to be preferred to one which would result both in folly and injustice.

In the case in hand the Judicial Committee had to construe the B.N.A. Act. If they adopted Mr. Lefroy's view they would have to adopt a view which would result in both folly and injustice. It would sanction the confiscation of property contrary to natural justice and would have sanctioned the view that one province might legislate regarding property in another province which would inevitably have led to inter-provincial friction and possibly to civil war.

But as I shewed by the case I put, not only was the decision wise and just, but also perfectly in accordance with the law.

Mr. Lefroy disputes the parallel. He says the bank could not deny that it was a debtor in Alberta, whereas it is quite clear that it could. Mr. Lefroy does not attempt to explain in what respect the bank's position differed from A.B.'s agent in the case I put. It held a fund payable to a railway company on the performance of a condition—which condition was never performed. Therefore, no right of action in the company, Mr. Lefroy chooses to ignore the condition.

He could hardly maintain that because the bondholders had a right of action in Alberta against the bank, that gave the Alberta Legislature power to confiscate the fund. According to that view, if I hold a bank note of the Royal Bank in Toronto because I have a right to sue the bank in Alberta for it, that would give the Alberta Legislature authority to confiscate the bank's debt to me—surely a *reductio ad absurdum*.

G. S. H.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT OF CANADA.

BELANGER v. MONTREAL WATER & POWER CO.

Que.]

[Oct. 13, 1914.

Municipal corporation—Contract with company—Franchise for water supply—Protection against fire—Liability of company to ratepayer.

A municipal corporation, with assent of the ratepayers, entered into a contract by which it gave the defendant company the exclusive privilege for twenty-five years of constructing and maintaining a system of water supply to the municipality. The company was authorized to fix rates for water supplied for domestic purposes and was obliged, for protection against fire, to have hydrants at certain places and at all times, except when the plant was undergoing necessary repairs, to have hose of a specified size and capacity and maintain a specified pressure of water. The property of B., a ratepayer, was destroyed by a fire which attained serious dimensions owing to the pressure being at the outset much less than that required.

Held, Brodeur, J., dissenting, that there was no contractual relation between B. and the company; that the contract did not evidence any intention by the parties to it to give it a right of action against the company to each ratepayer in case of violation of the provisions for fire protection; and that B., therefore, could not maintain an action for the value of his property so destroyed.

Held, also, Brodeur, J., dissenting, that B. could not maintain an action for damages on the ground that the failure to maintain the pressure stipulated for in the contract constituted a *délit* or *quasi-délit* under the law of Quebec.

Appeal dismissed with costs.

Mignault, K.C., and *Duranleau*, for appellant. *Atwater*, K.C., and *Buchanan*, K.C., for respondents.

Que.]

HOWARD v. STEWART.

[Oct. 13, 1914.

Crown lands—Location ticket—Transfer of location—Issue of Letters Patent—Title to land.

The holder of a location ticket for a lot on Colonization lands assigned it to a lumber company which agreed to clear the land and pay the instalments required for the issue of letters patent. The company went into liquidation and its curator, with judicial authority, sold the lot to H. The Government officials having given notice of intention to cancel the location ticket the original holder paid the instalments due, satisfied the officials that the necessary work on the lot would be done and received the letters patent. He then sold the lot to S. who cut some timber on it. In an action by H. to be declared sole owner of the lot and by *saisie revendication* of the timber so cut.

Held, reversing the judgment of the King's Bench (Q.R. 23 K.B. 80), Davies, J., dissenting, that the assignment of the location ticket to the lumber company was a sale of the land and not a mere promise of sale; that such sale was confirmed by the issue of the letters patent, and that S., having purchased after the letters patent issued with knowledge of the prior transfers, had not obtained title to the land the title being vested in H.

Appeal allowed with costs.

Ferdinand Roy, K.C., for appellant. *G. G. Stuart*, K.C., and *Rousseau*, for respondent.

B.C.]

CHAMPION v. WORLD BUILDING CO. [Nov. 30, 1914.

Appeal—Case originating in Superior Court—Supreme Court Act s. 37 (b)—Concurrent jurisdiction—Mechanics' Lien Act (B.C.)—Action to enforce lien.

For an appeal to lie to the Supreme Court in a case not originating in a superior court as provided in s. 37, sub-sec. (b) of the Supreme Court Act it is not sufficient that the inferior court has concurrent jurisdiction with a superior court in respect to its general jurisdiction; there must be concurrent jurisdiction as respects the particular action, suit, cause, matter or other judicial proceeding in which the appeal is sought.

In British Columbia the County Court alone may maintain an action to enforce a mechanics' lien. In such action, so far

as the parties or any of them stand in the relation of debtor and creditor, the Court may give judgment for the debt due whatever its amount and if it exceeds \$250 there may be an appeal to the Court of Appeal.

Held, Duff, J., dissenting, that though an action for the debt could be brought in the Superior Court the foundation for the County Court action is the enforcement of the lien as to which there is no concurrent jurisdiction and no appeal lies to the Supreme Court of Canada from the judgment of the Court of Appeal in such an action.

Appeal quashed with costs.

C. C. Robinson, for motion. Lafleur, K.C., contra.

EXCHEQUER COURT OF CANADA.

Cassels, J.] THE KING v. WILSON ET AL. [December 7, 1914.

Expropriation—Water-lot—Public harbour—Compensation—Market value—Approval of erections by Crown—Expectation of approval as element of market value.

In assessing compensation for lands compulsorily taken under expropriation proceedings any "special adaptability" which the property may have for some use or purpose is to be treated as an element of market value. *The King v. McPherson*, *infra*, followed. *Sidney v. North Eastern Railway Co.* (1914), 3 K.B.D. 629, referred to.

2. In such cases the Court should apply itself to a consideration of the value as if the scheme in respect of which the compulsory powers are exercised had no existence. *Cunard v. the King*, 43 S.C.R. 99; *Lucas v. Chesterfield Gas and Water Board* (1909), 1 K.B.D. 16; *Cedar Rapids Mfg. Co. v. Lacoste* (1914), A.C. 569, referred to.

3. The owner of a water-lot in a public harbour under a patent from the Crown granted before Confederation cannot place erections thereon without the approval of the Governor-in-Council as required by ch. 115, part 1, of R.S. 1906.

Held, that the market value of the water-lot is the proper basis for assessment of compensation, but while that value may be enhanced by the hope or expectation of obtaining authority to erect structures on the lot where there is no evidence of market

value to guide it the Court will not assess compensation on a hope or expectation which cannot be regarded as a right of property in the defendant. *Lynch v. City of Glasgow* (1903), 5 C. of Sess. Cas. 1174; *May v. Boston*, 158 Mass. 21; *Corrie v. McDermott* (1914), A.C. 1056, referred to.

Rogers, K.C., and *Tobin*, for plaintiff *Mellish*, K.C., for defendants.

Cassels, J.] THE KING v. MACPHERSON. [June 17, 1914.

Expropriation—Market value of land taken—Question as to adding 10% to value considered as a matter of right—Crown's liability to pay bonus due under mortgage on lands expropriated.

On the 14th April, 1913, the Crown, represented by the Minister of Public Works, registered a plan and description under the Expropriation Act for the acquisition of certain property in the City of Toronto for post-office purposes. Five days prior to such registration the defendant H., on behalf of certain other defendants, entered into an agreement for the purchase of the property in question for the sum of \$100,000. The Court found that at the date of the agreement to purchase neither H. nor the defendants for whom he bought were aware of the intended expropriation by the Crown, although the property had not been previously in demand in the real estate market.

Held, that the price paid for the property by the defendant H. should be taken at its actual market value for the purpose of compensation.

2. That the defendants were not entitled as a matter of right to have ten per cent. added to the market value of the property.

3. Where there is a mortgage upon property in which the mortgagor stipulates for a bonus to be paid him in case the principal is sought to be paid before the mortgage falls due, the Crown expropriating before that event must assume the payment of such bonus in addition to paying the value of the property taken.

DuVernet, K.C., for plaintiff. *Anglin*, K.C., and *Defries*, for defendants.

Audette, J.] WRIGHT v. THE KING. [November 7, 1914.

Principal and agent—Parol contract—Right to recover—Mandate—Art. 1702, C.C.P.Q.

The suppliant, who was not a registered broker, was telephoned to by the Collector of Customs at Montreal and asked to procure

for the Crown an option on certain property which was required for the site of a Customs building in the City of Montreal. Acting upon such instructions, the suppliant took the necessary steps to obtain the option which, after some delay occasioned by the owners, he succeeded in securing.

The Commissioner of Customs was then instructed to proceed to Montreal and arrange to secure the purchase of the property for which the suppliant had obtained the option. The suppliant and the Commissioner met at the Custom House in Montreal, and the latter authorized the suppliant to effect the purchase and asked him about his commission. The suppliant replied that $2\frac{1}{2}\%$ was the customary commission, adding that he was not a regular broker and that he would leave that part of the matter with the Commissioner to deal with as he deserved. The suppliant then obtained a deed of the property from the owners to the Crown.

Held, that the mandate was not gratuitous under Art. 1702 C.C.P.Q., and that as a matter of law the suppliant was entitled to recover a commission on the purchase of the property in question.

2. That as the evidence established that $2\frac{1}{2}\%$ was the usual commission paid under such circumstances, the suppliant was fully entitled to his claim which was at the rate of $1\frac{1}{2}\%$.

W. D. Hogg, K.C., for suppliant. *F. J. Curran*, for respondent.

Audette, J.]

GIBB v. THE KING.

[November 7, 1914.]

Expropriation—Abandonment of Public work—The Expropriation Act, sec. 23, sub-sec. 4—The Exchequer Court Act, secs. 19 and 20—Interpretation—Damages.

Upon a fair construction of the language of the Expropriation Act, sec. 23, sub-sec. 4, the jurisdiction of the Court is not limited to claims arising out of a partial abandonment of the property, but extends to claims for total abandonment as well.

2. Upon expropriation proceedings being taken it is the intention of the above enactment, so that actions be not multiplied, that the damages are to be assessed once for all in such proceedings, but where the Crown before judgment returns the property to the owner, and discontinues the action, so that damages are prevented from being assessed at all therein, then the owner of the property has a remedy by petition of right under the jurisdiction clauses (secs. 19 and 20 of the Exchequer Court Act).

3. The damage or loss in respect of which the Court will assess compensation must arise out of some physical interference with property or with some right incidental thereto, different in kind from that which all the properties in the neighbourhood are subject to, and must be of such a nature as would be actionable but for the statute authorizing the work. Hence, where the surrounding properties had been temporarily enhanced in value by reason of a projected Government work subsequently abandoned the owner of property no part of which has been taken has no claim to compensation because of the abandonment by the Government of the proposed scheme. On the other hand, where property has been taken and returned all damages arising out of any interference with the owner's rights in respect of leasing the lands during the period the expropriation was effective is a proper subject of compensation. *The Queen v. Murray*, 5 Ex.C.R. 69; *Cedar Rapids Power Co. v. Lacoste* (1914), A.C. 569, referred to.

4. For the purposes of a projected public work the Crown expropriated a market place and demolished the buildings thereon in the vicinity of suppliant's property. The Crown had also expropriated the suppliant's property which it subsequently returned to the suppliants.

Held, that suppliants had no right to damages for any depreciation in the value of their property arising from the destruction of the market, as any loss so arising to the suppliants was suffered by them in common with the other property owners in the neighbourhood.

Audette, J.]

LEAMY ET AL. v. THE KING.

[January 5.

Navigable river—Title to bed—Crown grant—Construction.

The bed of all navigable rivers is by law vested *prima facie* in the Crown. But this ownership of the Crown is exercised for the benefit of the subject, and cannot be used in any way so as to derogate from or interfere with the rights which belong by law to the subjects of the Crown. Hence, in a grant of part of the public domain from the Crown to a subject the bed of a navigable river will not pass unless an intention to convey the same is expressed in clear and unambiguous terms in the grant.

2. In the Province of Quebec all grants of the public domain made prior to the Union Act of 1840 are to be read as subject to the limitations, restrictions and reservations conserving the rights of the public as to navigation, and otherwise, contained in

the instructions to Lord Dorchester as Governor of Lower Canada. Since the passage of the Union Act of 1840 grants of the public domain in that Province have been made under the authority of the Provincial Legislature and subject to all such statutory restrictions as have been from time to time imposed

3. Under the decisions of the Seigneurial Court, constituted under the Seigneurial Act of 1854, together with the provisions of Art. 538 C.N. and of Art. 400 C.C.P.Q., navigable rivers are considered as being dependencies of the Crown domain and as such inalienable and imprescriptible. Hence all grants purporting to create rights in the bed of such rivers must be construed as subject to the exercise of the *jus publicum* at all times.

Cassels, J.]

[December 19, 1914.

IN RE MICKELSON SHAPIRO CO. AND HENRY DOERR, AND
MICKELSON DRUG AND CHEMICAL CO. AND ANTON MICKELSON.

Trade mark—Application for—Drawing—Infringement—Limited jurisdiction of the Exchequer Court of Canada—Passing off—Remedy.

In applying for a trade mark under the Canadian statute the applicant must describe in writing what he claims as his mark. A drawing must also be filed. But the claim in the written application cannot be extended by reason of something appearing in the drawing which has not been claimed.

2. The Exchequer Court of Canada has jurisdiction to restrain any infringement of a trade mark, but has no jurisdiction to entertain an action seeking damages for passing off goods of the plaintiff as those manufactured and sold by the defendant.

3. Trade mark for gopher poison, registered in Canadian Trade Mark Register No. 56, folio 13,708, ordered to be expunged.

W. L. Scott, for plaintiffs. *F. H. Chrysler*, K.C., for defendants

Audette, J.]

[November 19, 1914.

THE QUEBEC, MONTREAL AND SOUTHERN RAILWAY COMPANY
v. THE KING.

Railway—Insolvency—4-5 Edw. VII. ch. 158—Sale under order of Exchequer Court—Effect of—7-8 Edw. VII. ch. 63—Subsidy—Discretion of Governor-in-Council as to paying same—Order-in-Council and contract to pay subsidy based on mistake of fact—Invalidity.

The South Shore Railway, along with the Quebec Southern

Railway, was sold under order of the Exchequer Court of Canada on the 8th November, 1905. The suppliants acquired all the rights of the vendee under the sale in 1906, and became incorporated by Act of Parliament in that year for the purpose of holding, maintaining and operating the said railways under the name of the Quebec, Montreal and Southern Railway Company. In 1899, by 62-63 Vict. ch. 7, sec. 2, sub-sec. 27, the Governor-in-Council was authorized to grant a subsidy to the South Shore Railway Company from S. J. to L., "a distance not exceeding 82 miles." The South Shore Railway Company previous to January, 1902, constructed some 18½ miles of the projected railway, and was paid a subsidy for 12 miles, but the subsidy for the balance so constructed, namely, 6½ miles, was never paid to any one, presumably because the statutory requirements were not fulfilled. In 1903, by 3 Edw. VII. ch. 57, sec. 2, sub-sec. 12, the subsidy of 1899 was renewed, not in favour of the South Shore Railway Company in particular, but a general grant was made towards the construction of a line of railway from Y. to L. (including the 6½ miles in question), a distance not exceeding 70 miles, "in lieu of the subsidy granted by item 27 of sec. 2 of ch. 7 of 1899." The South Shore Railway did avail itself of this subsidy, and it lapsed. In 1908, by 7-8 Edw. VII. ch. 63, sec. 1, sub-sec. 14, the subsidy last mentioned was renewed, the Act providing that "the Governor-in-Council may grant a subsidy," but it was provided that the railway subsidized was to be completed before 1st August, 1910. The suppliants built the railway so subsidized. Upon a petition of right filed by the suppliants to recover subsidy in respect of the said 6½ miles not constructed by them but by the South Shore Railway Company:—

Held, 1. The language of 7-8 Edw. VII. ch. 63, sec. 1, sub-sec. 14, must be read as permissive and not mandatory, and that a petition of right to recover the subsidy would not lie where the same has not been paid by the Governor-in-Council. *Canadian Pacific Ry. Co. v. The King*, 38 S.C.R. 137, followed.

2. A contract entered into between the Crown and the suppliants for the payment of the subsidy in question, founded on an order-in-council passed on the assumption that the suppliants had constructed the 6½ miles in question, which the suppliants had not in fact done, cannot be enforced; and if moneys had been paid under such contract they could have been recovered back by the Crown under Arts. 1040 and 1048, C.C.P.Q.

3. The Crown is not bound by an order-in-council passed inadvertently and on mistake of fact. *De Galindez v. The King*, Q.R. 15 K.B. 320, 39 S.C.R., 682, followed.

4. The South Shore Railway Company not being in a position to enforce payment of the subsidy in dispute, the suppliants as assignees of the said company are equally disentitled to recover.

5. In disposing of public moneys under statutory authority, the Crown must adhere strictly to the terms of the statute, and neither by order-in-council nor by contract can the terms of the statute be enlarged or altered. *Hereford Ry. Co. v. The King*, 24 S.C.R. 15, followed.

Béique, K.C., for suppliants. *Lafferty*, K.C., for respondent.

Bench and Bar

OBITUARY

*LT.-COL. WILLIAM EDWARD O'BRIEN, LL.B.,
BARRISTER-AT-LAW.*

A notable Canadian passed from the scene when William Edward O'Brien died at his residence "The Woods," Shanty Bay, Lake Simcoe, on December 22nd, 1914, in his 84th year. By his death the country lost an able statesman, the profession of law a keen legal writer, the militia an active upholder and efficient soldier, and the Empire an ardent Imperialist and a devoted citizen.

Mr. O'Brien was the eldest son of a retired naval and military officer, Col. E. G. O'Brien; his mother being a daughter of Rev. Edmund Gapper, Rector of Charlinch, Somersetshire, England. He was born near Thornhill on March 10th, 1831. About that time his father was placed in charge of a settlement of half-pay officers and others on the shores of Lake Simcoe; afterwards being Chairman of the Quarter Sessions, and Colonel of the Simcoe militia, leading them to Toronto at the time of the Rebellion of 1836-7.

In the winter of 1831 Colonel E. G. O'Brien, with his wife and child, one year old, took up his grant of land on the north shore of Lake Simcoe, crossing the lake on the ice with a party of axemen, who, before night, cleared a sufficient space for and erected three shanties to house the party. This gave the name to the settlement. Under such stern and unusual circumstances W. E. O'Brien began his career. The other members of the family consisted of his brothers, Lucius Richard O'Brien, first

President of the Royal Canadian Academy, Henry O'Brien, K.C., of Toronto, and three sisters. His wife, daughter of the late Col. Loring, and his only child, Mrs. Verner Wilson, survive him.

There being no educational advantages in Simcoe in those days Colonel E. G. O'Brien moved to Toronto with his family; and W. E. O'Brien was educated at Upper Canada College. He then entered the field of journalism, being editor of a daily paper called *The Atlas*, and subsequently one of the editors of *The Colonist*, the Conservative organ of that day. Whilst so engaged he made time to read for his LL.B. degree at Toronto University, which he received in 1861. He then took up the study of the law and was called to the Bar in 1864. He practiced in Barrie for a short time, but his taste for country life took him to his father's old place at Shanty Bay, where he spent the rest of his life. He did not, however, abandon his literary pursuits, and many articles which appeared in the public press on subjects of constitutional law, the defence of the Empire and Imperial subjects were from his pen. Many of these and others of legal interest have appeared from time to time in this JOURNAL. His writings shew a literary style and diction of high order, an exact knowledge and judicial and fair treatment of any subject dealt with.

Early in life, coming of a fighting stock, he became interested in the volunteer movement. He was made captain of the Barrie Rifle Company, which afterwards became part of the 35th Battalion, known as the "Simcoe Foresters," and he was largely instrumental in the formation of that corps. He became its Lt.-Colonel in 1882 in succession to Lt.-Col. McKenzie and so remained until 1897, when he retired, becoming its Honorary Colonel. In the North-West Rebellion of 1885 he was placed in command of a provisional battalion taken from the "York Rangers" and "Simcoe Foresters." During this period he was in Qu'Appelle, and was specially mentioned for bravery and tact in dealing with hostile Indians then on the point of rising. In his book "Soldiering in Canada," Lt.-Col. Geo. T. Denison, speaking of this incident, says "Col. O'Brien went alone with an interpreter (to the Indian Camp), leaving his sword and pistol behind. He reasoned with the Indians and succeeded in arranging all satisfactorily and probably prevented an Indian outbreak. It was found out afterwards that the Indians, suspecting treachery, were ambushed all about the house in which the conference was held, in order to defend their chiefs. The act of Col.

O'Brien was one of the finest things done by any officer in the North-West. It required the highest courage both physical and moral. . . . The Canadian militia should be proud of him." Besides the Fenian Raid and the North-West Rebellion medals. Col. O'Brien held the General Service medal and clasp.

In 1897 he was present, by invitation, as the guest of the British Government, at Queen Victoria's Diamond Jubilee, as one of the representatives of the Canadian militia. In 1901 he was appointed Canadian Commissioner at the Glasgow Exhibition.

His entrance into political life was in 1878, when he unsuccessfully contested, in the Conservative interest, the District of Muskoka and Parry Sound, for the House of Commons. In 1882, however, he was elected for the same constituency, for which he continuously sat until 1896, when, owing to his break with his party hereafter alluded to, he necessarily ran as an independent candidate, but being bitterly opposed by the machine politicians there he was defeated by a small majority. From that day he seldom appeared in politics, though his interest in the welfare of his country remained unabated.

One of the best remembered incidents in the Parliamentary history of this country was the resolution asking for the disallowance of the Jesuit Estate Act of the Quebec Legislature. This matter, it may be noted, was first brought to the attention of the public in this JOURNAL, in several articles from the pen of Col. O'Brien. These articles were entitled, "The history and mischief of the Quebec Jesuit Estate Act" and "The Constitutionality of the Quebec Jesuit Estate Act." These may be found, ante vol. 25, at pages 69, 76 and 130, where the subject was fully explained and luminously treated.

The leading figure in the debate in the House of Commons and in the agitation caused thereby throughout the country, was "The man from Shanty Bay," as he was then often called. He moved the famous resolution, so well known in those days, the fight being continued in the House by the eloquence and force of the late D'Alton McCarthy, M.P., and others. Principal Caven. of Knox College, and other prominent citizens who led the Equal Rights movement, supported the action of the "Noble Thirteen," as they were called, who alone in the House dared to stand out against all political parties to oppose a measure which their conscience rejected as unconstitutional and unjust. The *Toronto Globe* thus refers to the incident:—

"The greatest day in Col. O'Brien's life was Tuesday, March 26, 1889, when in the House of Commons he moved as an amendment to the motion to go into supply:—

"That an address be presented to the Governor-General setting forth that this House regards the power of disallowing the acts of legislation of the Legislative Assemblies of the Province of Quebec vested in his Excellency in Council as a prerogative essential to the existence of the Dominion; that this great power, while it should never be wantonly exercised, should be fearlessly used for the protection of the fundamental principles of the constitution and for safeguarding the general interests of the people; that in the opinion of this House the passage by the Legislature of the Province of Quebec of an Act entitled "An Act respecting the settlement of the Jesuit estates" is beyond the power of that Legislature; firstly, because it endows from public funds a religious organization, thereby violating the unwritten, but undoubted, constitutional principle of the complete separation of Church and State, and of absolute equality of all denominations before the law; secondly, because it recognizes the usurpation of right by foreign authority—his Holiness the Pope of Rome—in declaring his consent necessary to empower the Provincial Legislature to dispose of a portion of the public domain, and also because the Act is made to depend on his will, and the appropriation of the grant thereby made is subject to the control of the same authority; and, thirdly, because the Society of Jesus is a secret and politico-religious body, the expulsion of which from every Christian community wherein it has had a footing was rendered necessary by its intolerant and mischievous intermeddling with the functions of the civil government.

"Therefore, this House prays that his Excellency will be graciously pleased to disallow the Act."

"The force of character necessary to the presentation of this amendment before a hostile House is illustrated in the Parliamentary report of the day in the *Globe* that 'there was not the faintest murmur of applause as Mr. O'Brien resumed his seat. His speech had been received in dead silence.'

"In the closing passages of this speech Col. O'Brien declared that he and those who stood with him were resolved 'that this Dominion must remain British and nothing else, and that no

foreign power, authority or jurisdiction, civil or religious, shall be allowed to exercise powers which interfere with that declaration.' ”

The *Toronto Mail* of that date said :—

“Colonel O'Brien has acquitted himself well. His resolution in amendment to the motion of supply pronounces the Jesuit Acts unconstitutional, first, because the endowment of the Order is a departure from the principle of religious equality and at variance with the view that there should be no connection between Church and State in Canada which was set forth by the Legislature forty years ago; secondly, because by the Act of endowment a foreign potentate is authorized to interfere in our domestic affairs; and, lastly, because the incorporation and endowment of this Order, which has been expelled from many European countries for various high offences, is contrary to public policy. Col. O'Brien supported these propositions in a clear and forcible speech, which will be read with great interest. His arguments on the question of public policy are, in our opinion, unanswerable, as is also his contention that the payment of the Jesuit claim was in direct contravention of the act of the King of Britain in escheating their derelict estates, which act the Legislature had over and over again confirmed, although it required no confirmation. Col. O'Brien deserves the thanks of the community for the manly and independent course he has pursued. He has set an example to the other Ontario members which it is to be hoped, for their own sake, they will follow.”

The *Telegram* thus referred to the same incident: “He did more than any other man to acquaint Ottawa with the rare virtue of Parliamentary independence.”

Recently the *Mail and Empire* said: “During the fourteen years of his career in the House of Commons no member commanded a greater measure of respect from his colleagues on both sides of the House, and from those holding a different faith, than did Col. O'Brien. It was felt by all that his opposition was based not on prejudice or opportunism, but on a firm belief that, in taking the course he did, he was serving the best interests of the country.”

The protest which arose resulted in the “Equal Rights” movement, which stirred the Dominion from end to end and aroused the conscience of the people as nothing has done from the time of Confederation up to the present war.

In 1896 Mr. O'Brien supported D'Alton McCarthy in his

opposition to the Manitoba Remedial School Bill, by which Sir Charles Tupper's Government sought to coerce Manitoba into the restoration of separate schools. Mr. O'Brien and Mr. McCarthy were read out of the party by the Conservative leader, thus depriving him of his two most independent followers, and who were among the most useful members in the House.

Many notices of the late legislator have recently appeared in the public press. It seems fitting that some of these should be quoted, illustrating, as they do, the regard in which he was held by all shades of politics. It also seems more suitable that, owing to his close association with the personnel of this JOURNAL that the thoughts of others should be given rather than our own.

Of him the *Toronto News* said: "Independent, honest, public-spirited and of high integrity, he was as good a type of public man as ever sat in a Canadian Parliament."

The *Toronto Star*, referring to his death, said: "Col. O'Brien was a Canadian of a good type. Born in the forest of Simcoe he may be fairly classed with the pioneers, the men who loved Canada and had faith in Canada when it was small and obscure. In the House of Commons at Ottawa he won a reputation for genuine, sturdy independence. When he differed from his party he seemed to do so because he was constrained by his honesty or sense of fair play. He never became a popular hero, though he might have been one if he had chosen to advertise himself. His independence made him rather a lonely figure at Ottawa. Popular feeling against the Jesuit Estates Act was stronger than the Parliamentary vote would indicate. But Col. O'Brien never attempted to make capital out of the popular feeling. He voted with the thirteen because he thought it was right; and he would have cast his solitary vote against all the rest of the House with the same firmness and with the same modesty. He was an Imperial Federationist when the movement was regarded as a fad. He sought no prominence when the movement became popular. He was an early advocate of a British preference, to be effected by a reduction of the Canadian tariff, and although a Conservative he was not an ardent protectionist. But the important thing is not the nature of the views which he held, but the manner in which he held them; his civic courage and his strong sense of public duty, his unselfishness and his indifference to praise or blame."

The *Toronto Globe* said that "during his entire Parliamentary career of unceasing and strenuous party strife, he never lost

a personal friend or made a personal enemy, and never forfeited either the affection of his friends or respect of his opponents. A cultured gentleman, he always sought to maintain the dignity of the House, and his bearing and language were frequently a severe rebuke to those who did not maintain his own high ideals of personal and official conduct." And again, "He was a fine exemplar of those very qualities which have moved Britons to stake their all rather than break their pledged word to little Belgium. Canadians like William O'Brien maintain in this new world the highest traditions of the old. He was an honourable and courageous man, and he bore himself through life with the quiet dignity of a gentleman. To him was given the privilege of living up to the high standard so pithily expressed in the noble words of George Herbert, that good divine of the old Church O'Brien loved and served so well:—

" 'Lie not, but let thy heart be true to God,
Thy mouth to it, thy actions to them both.' "

The funeral took place from "The Woods," Shanty Bay, on December 26th. His old regiment desired that it should be a military funeral, and this was carried out with the soldierly precision of that fine corps. Among the clergymen who took part in the service was the Ven. Archdeacon Cody, of Toronto, who referred to the deceased as "one who, by patient doing of great things, has helped to make the history of our Dominion, and will be seen in the future, even more than in the present, to be one of Canada's outstanding citizens. During the time he was a member of the Dominion Parliament friend and foe alike learned to respect, admire and like him. No one for a moment thought he had any private end to serve. William O'Brien was a man without fear. What his conscience said, that was his conviction. He feared not the frown, neither was he swayed by the fawning of men. He represented a noble type of public servant. His name will go down to fame in Canadian history as one who stood against all the blandishments that could be brought to bear on him; as one who withstood the attacks and criticisms of both friends and foes, because he defended those great principles of religious liberty which had been won in the past at the cost of blood and sacrifice. He was no opportunist in politics or in daily life, but a man of conviction, a man of magnanimity, who could forgive; a man of sympathy, a man who knew that the true foundation of national greatness lay in the character of the citizens."

HAMILTON LAW ASSOCIATION.

The report of the above association for the past year was presented at its thirty-fifth annual meeting, on December 31, 1914. It states that the present membership is 91, as compared with 86 the previous year. The Treasurer's report gave a detailed statement of receipts and disbursements. The finances of the association were reported as being in good condition, there being no overdrafts. The Librarian stated the number of bound volumes in the library to be 5,248, of which 117 volumes were added during the year; the library being also supplied with all the latest appropriate legal publications. The death of J. W. Nesbitt, K.C., for many years a prominent member of the association, was reported with regret. A marked improvement during the year was the publication of a new catalogue of the books in the library, the last publication having been in 1899.

War Notes.

The sentiment of the most worthy citizens of the United States, that is, the large majority, leaving out Germans and Fenians, has been shewn to be in favour of the stand taken by England in reference to Belgium and the fight of the allies for the freedom of the world from military despotism. William Watson, the Poet Laureate of England has taken occasion to appeal to this sentiment in the following stirring lines:—

TO AMERICA.

Art thou her child, born in the proud midday
Of her large soul's abundance and excess:
Her daughter and her mightiest heritress,
Dowered with her thoughts, and lit on her great way
By her great lamps that shine, and fail not?

Yes!

And at this thunderous hour of struggle and stress,
Hither across the ocean wilderness,
What word comes frozen on the frozen spray?

Neutrality! The tiger from his den,
Springs at thy mother's throat, and can'st thou now
Watch with a stranger's gaze? So be it then!

Thy loss is more than hers; for, bruised and torn,
She shall yet live without thine aid, and thou
Without the crown divine thou might'st have worn.

The Judges of the Appellate and High Court Divisions at Osgoode Hall, Toronto, have subscribed a sufficient amount to provide an automatic machine gun, complete, with spare parts, accessories and ammunition, which they intend to present to the Osgoode Hall Rifle Association, on condition that they agree to man it and attach it to one of the Toronto Volunteer Regiments, preferably to the first one to form a Law Students Company. This gift will be subject to the approval of the military authorities, at whose disposal the gun will, of course, be placed. It is thought probable that some of the organizations representing the legal profession, official and otherwise, will make like gifts. If so, it may induce other groups of men, connected with different interests, to follow suit, with the result that a full battery will be provided for the Third Contingent when it is ready to proceed to the front.

We should have noted before this that the Benchers of the Law Society have not been unmindful of the obligations of the Ontario profession to the country in reference to war matters. Towards the close of last year they set aside the sum of \$10,000 for the Canadian Patriotic Fund. They have also fitted up a rifle range in the basement of Osgoode Hall and equipped it with a sufficient number of rifles for the use of the Osgoode Hall Rifle Association.

The Ontario Bar Association at its recent meeting passed resolutions requesting the Council to take steps to collect from the members of the profession the sum necessary for the purchase of a machine gun and a like sum to be applied towards the relief of the Belgian sufferers, in all approximately \$2,000.

It has been said that law students attending the Law School at Toronto have not responded with the enthusiasm that was expected of them to the invitation to enlist in the ranks of the Osgoode Hall Rifle Association. We trust that this will not be so in the future even if it has been so in the past.

We note that the members of the English Bar in the Probate and Divorce Division, together with their clerks, have presented the Government with a Red Cross Ambulance, fully equipped, at a cost of £400, while the law clerks throughout England and Wales are raising a fund for the purchase of several ambulances for the use of the army authorities.

The unusual spectacle of barristers appearing in Court without regulation dress has been seen in some of the English Courts. Those of the Bar who are engaged in active military duties being allowed to appear in khaki instead of wig and gown.

The Judges of the Ontario Supreme Court have passed a rule to the same effect.

Flotsam and Jetsam.

WOMEN AS LAWYERS—MODERN VIEW.

In accord with modern opinion and enlightened practice in other branches of intellectual endeavour, women are now enabled to become registered as members of the medical and its kindred professions, members of royal commissions, visitors of lunatic asylums, inspectors of nuisances, registrars of births, deaths, marriages, members of dispensary boards, road surveyors, overseers of the poor, churchwardens, sextons, parish clerks, local government board inspectors, factory and workshop inspectors, post mistresses, census clerks, poll clerks, Parliamentary registration agents, members of school boards, insurance commissioners, and members of insurance committees. There are also women carrying on business as accountants and stockbrokers, patent agents and engineers. As we all know, women are enabled to obtain at certain Universities bachelor and master degrees, which include legal degrees. Further, I need hardly enumerate the various civilized countries which have admitted women to practice the profession of the law; amongst other countries they include France, Norway, Switzerland, Australia, Canada, New Zealand, Italy, Egypt, Russia, Japan, partly in India, and the United States of America.

If women who have qualified themselves for the unromantic, serious, and responsible profession of a solicitor calmly and decorously request to be allowed to become solicitors, why should that request be refused? So far as the profession is concerned, there is nothing improper or inexpedient in allowing competent women to become solicitors. Why should woman be prevented from developing her life along the lines for which her particular capabilities may fit her and in which she is most interested, thus depriving the state of her services in any profession in which she may be fitted by nature or education to excel?

I can hardly bring myself to believe that there is an underlying and unexpressed opinion—a selfish and timid attitude of

mind—that the profession is overcrowded already. This could not be so when every man who is qualified is allowed to become a member as “of course.”

Nowadays it is common ground that a very high percentage of educated and intelligent women have to support or help to support themselves, and there are many of such women who are admirably qualified by nature as well as by education to embellish, and, I venture to think, enhance the value of the profession of a solicitor in the eyes of the public as well as of their brother and sister members.—*London Law Journal*.

Humour is more than a mere plaything to relieve the tension of the brain. But even when it does that it has performed a service for the public speaker that is incalculable. The tension of the minds of an audience and, especially of a jury, is nothing more than the natural resistance of every mind to accepting another's point of view until convinced either by the irresistible logic of the other's reasoning or confidence in his personality. When this tension becomes very severe the adroit speaker stops the fountain of his eloquence and the heavy pressure of his logic, he causes his face to relax, his personality sends forth a warm and familiar glow, and he proceeds to “tell a little story.” His auditors are quickly receptive, the facial muscles come to repose and they begin to “fellowship,” unconsciously it may be, with the speaker. This fellowship begets confidence and confidence breaks down the instinctive resistance of the speaker's arguments and these arguments are then accepted at their face value. This, in short, is the psychological effect of a good story on the minds of an ordinary company of auditors. It is, indeed, a most powerful aid to the wise public speaker if used with discretion. Of course, if used too frequently it loses its freshness like everything else in life does, and, therefore, loses its effect.—*Central Law Journal*.

SOLOMON MODERNIZED.—A Georgia magistrate was perplexed by the conflicting claims of two negro women for a baby, each contending that she was the mother of it. The Judge remembered Solomon, and, drawing a bowie knife from his boot, declared that he would give half to each. The women were shocked, but had no doubt of the authority and purpose of the Judge to make the proposed compromise. “Don't do that, boss,” they both screamed, in unison. “You can keep it yourself.”

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MARRIAGE AND DIVORCE IN CANADA.*

PART I.

1. INTRODUCTION.
2. JURISDICTION, DOMINION AND PROVINCIAL.
3. DOMINION LEGISLATION.
4. SOURCES OF THE PROVINCIAL LAWS.
 - (1) *British Columbia.*
 - (2) *North West Territories, Alberta, Saskatchewan and Manitoba.*
 - (3) *Ontario.*
 - (4) *Quebec.*
 - (5) *The Maritime Provinces.*

PART II.

1. CAPACITY FOR MARRIAGE.
2. CIRCUMSTANCES RENDERING THE MARRIAGE VOID.
 - (1) *The legal age of marriage.*
 - (2) *Insanity.*
 - (3) *Existing previous marriage.*
3. CIRCUMSTANCES RENDERING THE MARRIAGE VOIDABLE.
 - (1) *Impotence.*
 - (2) *Consent—Error, fraud, or duress.*
 - (3) *Relationship within prohibited degrees.*
 - (4) *Spiritual or official positions.*
 - (5) *Difference of religion.*
 - (6) *Marriage of minors—Consent of parents.*
 - (7) *Communicable diseases or feeble-mindedness.*

* The scope of this article, prepared by Fraser Raney, M.A., LL.B., Barrister, with an introduction by W. E. Raney, K.C., appears by the following summary. Part I. is given in this number. The other parts will appear subsequently.

PART III.

1. THE MARRIAGE CEREMONY.

- (1) *The three main classes of marriage ceremonies.*
- (2) *Who may solemnise marriage in the various Provinces.*
- (3) *Authorisation of marriage—Banns or license.*
- (4) *Time, place and witnesses.*

2. REGISTRATION OF MARRIAGES.

PART IV.

1. DIVORCE TRIBUNALS AND THE GROUNDS UPON WHICH DIVORCE IS GRANTED.

2. DIVORCE BY ACT OF PARLIAMENT.

3. DIVORCE BY PROVINCIAL COURTS.

4. PROCEDURE.

5. FOREIGN MARRIAGES.

6. DISSOLUTION OF MARRIAGE.

- (1) *By Canadian Divorce Courts.*
- (2) *By Courts of a foreign country.*

PART V.

1. RIGHTS AND OBLIGATIONS OF PARENTS AND CHILDREN.

- (1) *General statement.*
- (2) *Adoption.*
- (3) *Children of divorcees.*
- (4) *Children born out of wedlock.*

PART I.

1. INTRODUCTION.

By common consent of all the civilized countries of the world, the most important relationship known to society is that of marriage. And by the like common consent, monogamy is the only foundation upon which it is possible to build the institution of the home, and therefore, the only form of the marriage relation consistent with the true happiness of men and women, and the well-being of the race. It is therefore just and right that marriage, as we in Canada approve of it, should be surrounded by the highest legal sanctions. But it is also important that the laws with relation to this fundamental subject should be clear, consistent and generally understood.

The divided jurisdiction between the Parliament at Ottawa and the local Legislatures does not lend itself to simplicity of treatment, and the matter is still further complicated by the relationship of the laws of the different provinces to the laws of England (depending in each case upon the date when the laws of England were introduced) and by the further fact that the civil laws of Quebec, founded as they are upon the laws of France, are fundamentally different on this subject from the laws of the other provinces.

No effort has, so far as known to the writer, ever been made to simplify and harmonize the marriage laws of Canada. For the most part they just grew, and as there were ten or a dozen gardens far removed from each other, it will not be surprising if the growth presents some forms of contrast and some features that are not in harmony with the generally received social standards.

Take, for example, the law with reference to the prohibited degrees of affinity and consanguinity. These were declared by the Parliament of England at the Reformation, and were introduced into this country with the laws of England. Under the statute of Henry¹ a marriage forbidden by these prohibitions was voidable at the suit of one of the parties in the lifetime of the other. This law remained unchanged in England until 1835, when by Lord Lyndhurst's Act² such a marriage was made "absolutely null and void." The preamble to this Act recites that "Whereas marriage between persons within prohibited degrees are voidable only by sentence of the ecclesiastical court pronounced during the lifetime of both the parties thereto, and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void and not merely voidable," etc.

1. 28 Henry VIII. ch. 7.

2. Imperial Statutes, 5 & 6 William IV. ch. 54.

But the same objections which existed in 1835 to the then state of the law in England, exist in Canada to-day. For instance, if a man marries his brother's or his nephew's widow, the marriage is voidable, and in the Provinces where there are Courts having jurisdiction in matrimonial causes, such a marriage will be set aside, and the children of the union thereby made illegitimate. The same will be true of the marriage of a woman with her deceased husband's brother, or deceased husband's nephew. Furthermore, there appears to be nothing in the law of Canada to render void even a marriage within the prohibitive degrees of consanguinity, except that no Christian country would recognize an incestuous marriage, that is to say, a marriage in the direct line of descent, or a marriage between brother and sister. In other words, the marriage of a man with his aunt or his niece is, under the laws of Canada, not like a bigamous marriage, void, but only voidable, and the status of the children of such a union or of any other union forbidden by the rule with reference to prohibited degrees, will remain "unsettled" so long as both parents live or until the judgment of a competent legal tribunal.

One scarcely knows whether to approve less of Lord Lyndhurst's Act, which, with the late modification in favour of a deceased wife's sister, is still the law of England; or the statute of Henry, which, with the modifications imposed by the Parliament of Canada in favour of a deceased wife's sister and a deceased wife's niece, is still the law of Canada. Under the law as it is in England the marriage of a man with his brother's or his nephew's widow would be equally void with his marriage with his aunt or his niece, and in either case the children of the union would be illegitimate. Under the law as it is in Canada a man's marriage with his brother's or nephew's widow would also be on the same footing precisely as his marriage with his aunt or his niece, but here either would also be equally good or equally bad at the option of either party to the marriage contract during the life of both, and in either case the children of the union would be legitimate or illegitimate at the like option.

Regarded historically, it is not altogether easy to determine which statute has the more reputable parentage. Indeed, both

may be said to be illegitimate in the strict etymological sense of the word. It is quite true that the prohibited degrees were recognized by the Church for centuries before the reign of Henry the Eighth, but the historical venerableness of the ecclesiastical rule loses most of its value when it is remembered that it was for these centuries a prolific source of Church revenue, a permit in a case of affinity being always to be had for a consideration. Indeed, Henry's own marriage to Catherine was under a papal dispensation. It is also true that the Parliament of Henry declared all such marriages to be "prohibited by God's laws." But a less subservient age has discerned that when Henry's obedient law-makers enacted this statute the monarch, violently smitten of the charms of Anne Boleyn, was eager to divorce Catherine, who had been his brother's widow, and that it was under this statute that Catherine actually was divorced. So that in truth the prohibited degrees as we have them in Canada are based upon the matrimonial vagaries of an English monarch of the Sixteenth century.

The motive underlying Lord Lyndhurst's Act was scarcely more respectable. The Duke of Bedford had married his deceased wife's sister and the descent of his estates was in jeopardy. His friend, Lord Lyndhurst, came to his assistance with an Act which provided that all voidable marriages then existing were to be valid and that no such union was in future to be assailed after two years from the date of the marriage. The Bill passed both Houses and was in its final stage in the Lords without material alterations when the Bishop of London insisted upon an amendment providing that for the future all such marriages should be absolutely and *ipso facto* void. A deadlock ensued with the Commons until an understanding was reached that a supplementary measure would be introduced early in the next session, and, with that understanding, the Bill, with the amendment of the Bishop of London, became law. The supplementary measure never was brought down. As has been suggested, the situation lends itself to the remark of a famous jurist that "An Act of Parliament can do no wrong, but it can do several things that look very odd."

There are also certain other phases of the subject in which there will be common agreement that the time has come for the adoption of important changes in the law.

Two or three instances will serve.

The law, as interpreted in Ontario, which tolerates polygamy in practice among nominal monogamists, but punishes polygamists who are also Mormons in name, is by common consent a scandal; and however doctors of law may differ as to the advisability of a divorce court for Canada they will all agree in reprobating divorce by special Act of the Parliament of Canada.

There will not be a unanimous request for full legal recognition of the science of eugenics, as applied to the marriage relation, but all will probably agree that the presence of certain communicable diseases in one of the parties ought to be an impediment to marriage, and there will be a disposition to give a respectful hearing to the arguments of those who urge that feeble-minded persons ought not to be permitted to marry.

Though the Dominion Parliament is authorized to legislate on the entire subject of marriage and divorce (excepting only the solemnization of marriage, which is assigned to the Provincial Legislatures), the federal field remains almost wholly uncultivated, the entire body of Dominion legislation on the subject, apart from the Criminal Code, being comprised in three lines in the Revised Statutes of Canada, the effect of which is to legalize the marriage of a man with his deceased wife's sister or his deceased wife's niece.

Ought it to be too much to hope that at no very distant date the Parliament of Canada will turn its attention seriously to this subject and enact legislation that will remove existing anomalies and bring the law abreast of public sentiment and of modern social conditions?

W. E. RANEY.

2. JURISDICTION—DOMINION AND PROVINCIAL.

In the distribution of subjects of legislation between the Dominion and the Provinces under the British North America Act, the Dominion Parliament is empowered to legislate on the subjects of marriage and divorce³ and the Provincial Legislatures on the subject of solemnization of marriage.⁴

Additional jurisdiction with regard to marriage is conferred by the Act upon the central government by the sub-section dealing with Criminal Law procedure⁵ and upon the local assemblies by the sub-section dealing with property and civil rights.⁶ Two other sections of the Act are also of importance. One of them⁷ empowers the Parliament of Canada to provide "for the establishment of any additional Courts for the better administration of the laws of Canada"; this has been interpreted to give power to create a Divorce Court.⁸ The other⁹ provides that existing laws and Courts "shall continue in Ontario, Quebec, Nova Scotia and New Brunswick, as if the union had not been made," subject to repeal or abolition by the Imperial Parliament, the Parliament of Canada or by the Legislature of the Province in question. Provision was also made for the admission into the Dominion of Prince Edward Island and British Columbia¹⁰ and when these Provinces were afterwards taken into the Dominion their existing laws and Courts were also continued. Consequently, the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, which had enacted legislation on the subject of marriage and divorce prior to Confederation, and Ontario and Quebec, which had legislation on the subject of marriage, including provisions as to capacity to contract marriage, are still under those Acts, except as they may have been repealed or amended.

3. Sec. 91, sub-sec. 26.

4. Sec. 92, sub-sec. 12.

5. Sec. 91, sub-sec. 27.

6. Sec. 92, sub-sec. 13.

7. Sec. 101.

8. Todd—"Parliamentary Government in the British Colonies," 2nd ed., at p. 595.

9. Sec. 129.

10. Sec. 146.

The limits of the respective jurisdictions of the Dominion Parliament and the Provincial Legislatures have recently been more clearly defined by the Judicial Committee of the Privy Council, affirming a judgment of the Supreme Court of Canada,¹¹ and it is now settled beyond controversy that the Parliament of Canada has no right to legislate in regard to the solemnization of marriage.

The specific point decided was that the power of the several Provinces to legislate as to the solemnization of marriage entitles them to say if they choose that only certain ministers shall be competent to perform the ceremony of marriage for certain persons; for example, for members of the church to which the minister belongs; and that non-compliance with this formality will render the marriage invalid. The Federal Government, moreover, cannot deprive the Provinces of this power by a law providing that any minister may marry anybody whether belonging to his church or another, because this would be legislation dealing strictly with the subject of solemnization of marriage.

3. DOMINION LEGISLATION.

It is noteworthy that since Confederation the Dominion Parliament, apart from the provisions of the Criminal Code, has passed only two statutes dealing with marriage and divorce. In 1882 marriage between a man and his deceased wife's sister was legalized¹² and in 1890 marriage with a deceased wife's niece was legalized.¹³ It was not until the Act of 1907¹⁴ that marriage with a deceased wife's sister was legalized in England, and marriage has never been legalized in England with a deceased wife's niece.

The Criminal Code of Canada deals with offences in relation to conjugal rights. A bigamist is liable to imprisonment for seven years, and in case of a second offence to imprisonment for fourteen years.¹⁵ The going through the form of a bigamous

11. *In re Marriage Legislation in Canada* (1912) Appeal Cases, p. 880.

12. Statutes of Canada, 45 Vict. ch. 42, sec. 1.

13. Statutes of Canada, 53 Vict. ch. 36.

14. Imperial Statutes, 7 Edw. VII. ch. 47.

15. Criminal Code, R.S.C. ch. 146, sec. 308.

marriage, not the relationship afterwards, is the indictable offence. There is no crime if the accused on reasonable grounds believed his lawful wife or husband to be dead; or if the wife or husband has been continually absent for seven years and has not been heard of during that time; or if the accused has been lawfully divorced from the bond of the first marriage; or if the former marriage has been declared void by a Court of competent jurisdiction. To constitute a crime punishable before a Canadian Court the general rule is that the offence must have been committed in Canada. Bigamy is an exception to this rule to this extent, that if the accused person, being a British subject resident in Canada, contracted the bigamous marriage in another country, having left Canada "with intent to go through such form of marriage," the offence is one cognizable in a Canadian Court. This provision has particular application to the cases of Canadians who go to the trouble to procure so-called divorces from Dakota or other easy-going States, founded on a pretended domicile, and having procured these worthless papers afterwards go through the form of a marriage ceremony in the United States. Neither the Dakota bill of divorcement, nor the fact that the marriage ceremony was performed outside of Canada, will avail as a defence in a Canadian Court if the accused left Canada "with intent to go through such form of marriage."¹⁶

The Criminal Code prohibits the practice "of any form of polygamy or of any kind of conjugal union with more than one person at the same time, or what among persons commonly called Mormons is known as spiritual or plural marriage," under penalty of imprisonment for five years and a fine of five hundred dollars.¹⁷ The teeth of the polygamy section of the Code were, however, drawn in 1893, when it was held by Chief Justice Armour of the Ontario bench that this section was intended to apply only to Mormons.¹⁸ Under the laws of Canada as interpreted by this decision it would appear to be no offence for a resident of Canada

16. Sec. 307, sub-sec. 4.

17. Sec. 310.

18. *The Queen v. Liston*; article on Bigamy and Divorce by W. E. Raney, 34 Canada Law Journal, p. 546.

to occupy the relation of husband to two or more women at the same time, so long as he is not a Mormon and so long as he is careful not to contravene the bigamy sections. In other words, he may be a polygamist in practice, but must not be also a Mormon in name.

But the language of the polygamy section is wide and it is worth noting that the view of Chief Justice Armour was not followed by a Quebec Judge in a more recent case.¹⁹ An authoritative pronouncement on the subject by an appellate Court is to be desired.

Procuring a feigned marriage is punishable by seven years' imprisonment,²⁰ while a penalty of two years' imprisonment is imposed on anyone who solemnizes a marriage without lawful authority or procures such a marriage to be performed.²¹ Solemnization of a marriage contrary to law renders the offender liable to a penalty of one year's imprisonment.²²

A husband is criminally liable for the death of his wife if her death occurs through his failure to supply her with necessaries,²³ and by an amendment of 1913 a husband who neglects to provide such necessaries when his wife and children are destitute is liable to a fine of five hundred dollars or to imprisonment for one year.

4. SOURCES OF THE PROVINCIAL LAWS.

Generally speaking, the sources of the law now enforced by the various Provincial Courts are as follows:—

(1) *British Columbia*.—British Columbia is subject to the law of England as of the 19th of November, 1858, in so far as such law is not rendered inapplicable by local circumstances, and in so far as not repealed or varied by federal or provincial legislation. This is by virtue of a proclamation of that date subsequently confirmed by Provincial statute.²⁴

19. *The King v. Harris* (1906) 11 Canadian Criminal Cases, p. 254.

20. Sec. 309.

21. Sec. 311.

22. Sec. 312.

23. Sec. 242, sub-sec. 2.

24. Sir James Douglas' Proclamation of November 19th, 1858, confirmed by the English Law Ordinance (1867), now Revised Statutes of British Columbia (1911) ch. 75.

With regard to marriage, the Marriage Act of British Columbia²⁵ first enacted as the Marriage Ordinance of the 2nd of April, 1867, provides that in all matters relating to the mode of celebrating marriage, the validity thereof, the qualifications of parties about to marry, and the consent of guardians or parents—the law of England shall prevail—subject to the provisions of the Act.

After there had been conflicting decisions in the British Columbia Courts, the Judicial Committee of the Privy Council finally decided that the English Divorce and Matrimonial Causes Act of 1857 was not rendered inapplicable to British Columbia by local circumstances, and that jurisdiction to pronounce decrees of divorce was vested in the Supreme Court of that Province.²⁶

(2) *North West Territories, Alberta, Saskatchewan and Manitoba.*—The North West Territories Act of 1886²⁷ enacts that the laws of England relative to civil and criminal matters as they existed on the 15th of July, 1870, shall be in force in the North West Territories²⁸ in so far as the same can be made applicable and in so far as not repealed, and “subject to the provisions of the Act.” The laws of the Provinces of Manitoba, Alberta and Saskatchewan and the Territory of the Yukon are founded upon the laws of the North West Territories as so derived.²⁹ The North West Territories Act would seem to be wide enough to bring into force the laws of England with regard to marriage and divorce,

25. Rev. Stat. B.C. (1911) ch. 151.

26. *Watt v. Watt* (1908) Appeal Cases, p. 573, approving of the judgment of Mr. Justice Martin in *Shepherd v. Shepherd*, 13 B.C. Rep. (1908) p. 487.

27. R.S.C. (1906) ch. 62, sec. 12, re-enacting Statutes of 1886 ch. 25, sec. 3, embodying Imperial Order-in-Council of the 23rd of June, 1870.

28. The North West Territories now comprise the territories formerly known as Rupert's Land and the north-western territory except such portions thereof as form the provinces of Manitoba, Saskatchewan, Alberta and the Yukon Territory, together with all British territories and possessions in North America, and all islands adjacent thereto not included within any province except the colony of Newfoundland and its dependencies [North West Territories Act, R.S.C. 1906 ch. 62, sec. 2 (a)]; that is, the districts of Mackenzie, Keewatin, Ungava and Franklin. In 1870 the provinces above excepted still formed part of the Northwest Territories.

29. The Yukon Territory Act, 61 Vict. ch. 6, sec. 9; The Saskatchewan Act, 4 & 5 Edw. VII. ch. 42, sec. 16; The Alberta Act, 4 & 5 Edw. VII. ch. 3, sec. 16; Con. Stat. Man. 1880 ch. 31, secs. 3 and 4.

in the Territories and the Provinces formed out of them, when these subjects have not been dealt with by subsequent provincial or federal legislation. This point has not, however, been judicially determined.³⁰

The Manitoba Marriage Act, 1906, as amended in 1910, is broader than the British Columbia Act and deals with consent, non-age and impotency.

(3) *Ontario*.—The law of Ontario is based on the English Common Law and Statute Law of the 15th of October, 1792, in so far as applicable.³¹ The statute of 1792 provides that in matters of controversy relative to property and civil rights, and as to testimony and legal proof, the law of England as of that date shall be binding, except as repealed by any Act of the Imperial Parliament having force in Upper Canada, or by Act of the Province of Upper Canada.

As there was no law in England permitting the dissolution of marriages except by Act of Parliament until 1857³² the Province of Ontario has not now and never has had any Court with jurisdiction to grant a divorce. For some time it was held, following a dictum of the Chancellor of Ontario,³³ that the Supreme Court of Ontario had jurisdiction to declare the nullity of a marriage which had been procured by fraud or duress. In a very recent case, however, this decision has not been followed, and it appears now to be well settled that the Ontario Courts have no such jurisdiction.³⁴

(4) *Quebec*.—In Quebec the law of marriage rests on the Civil Code which came into force on the 1st day of August, 1866, the year preceding Confederation.³⁵ The Civil Code codifies the

30. See Eversley & Craies—"Marriage Laws of the British Empire," London, 1910, p. 247 (Note).

31. Statutes of Upper Canada, 32 Geo. III. ch. 1; Con. Stat. Can. (1859) ch. 9.

32. The Matrimonial Causes Act, Imperial Statutes, 20 & 21 Vict. ch. 185.

33. *Lawless v. Chamberlain* (1890) 18 Ont. Rep., p. 296.

34. *Reid v. Auld* (1914) 7 Ont. Weekly Notes, p. 85.

35. Proclamation of Governor-General Lord Monck of the 26th of May, 1866. See Sharp's Civil Code, p. xix.

old French law of Quebec as modified by the conquest and by subsequent provincial statutes. The provisions of the code dealing with marriage, tutorship and property are wholly of French origin.³⁶

The Civil Code deals not only with Solemnization of Marriage but with the capacity to contract a marriage. Dissolution of marriage, according to the code, can only be by death, although separation from bed and board may be granted. It is maintained by some writers that the Imperial Parliament could not have intended to grant to the Federal Parliament jurisdiction over divorce in the Province of Quebec, where divorce is not permissible according to the tenets of the Roman Catholic Church. This position, however, is not tenable.³⁷

(5) *The Maritime Provinces*.—Nova Scotia and New Brunswick, although acquired by conquest in 1713, have been treated by the Courts as planted colonies and subject to the law of England as of that date. New Brunswick enacted legislation on marriage and divorce long before Confederation;³⁸ indeed, its divorce legislation was prior to English legislation on the subject. Nova Scotia had also before Confederation established a Court with jurisdiction "over all matters relating to prohibited marriages and divorce," and with authority to nullify marriages for impotence, adultery, cruelty, pre-contract or kinship within the prohibited degrees.³⁹

Prince Edward Island, like New Brunswick, was originally part of Nova Scotia, from which it separated in 1770, and has also been treated as a planted colony. Its Divorce Court was established in 1835.⁴⁰

(To be Continued.)

36. Walton—"The Scope and Interpretation of the Civil Code of Canada," Montreal (1907), at pp. 23 and 133.

37. *Ib.* pp. 63-64; and cf. Loranger, *Commentaire sur le Code Civil*, Montreal (1879), vol. 2, No. 81 *et seq.*; Mignault, *Droit Civil Canadien*, vol. 1, p. 551.

38. Statutes of New Brunswick, 31 Geo. III. ch. 5.

39. Revised Statutes of Nova Scotia (2nd Series, 1851) ch. 128.

40. Statutes of Prince Edward Island, 5 Wm. IV. ch. 10.

THE MINISTER OF JUSTICE.

Some misapprehension has existed as to the right or propriety of a salaried Minister of the Crown receiving, at the same time, superannuation allowance as a retired Judge. The Hon. C. J. Doherty, Minister of Justice of Canada, and formerly a Judge of the Superior Court of the Province of Quebec, was recently charged, in Parliament, with having resigned his Judgeship on the ground of ill-health, and having—five years afterwards—accepted the active duties, and the salary, of a Minister of the Crown. The Minister, from his place in the House, denied that he had resigned by reason of incapacity to fulfil his duties as Judge, and shewed that he was entitled to retirement, and therefore to superannuation, under the terms of R.S.C. c. 138, s. 20. This enactment provides (*inter alia*) that, “if any Judge of . . . any superior Court in Canada, who has continued in the office of Judge . . . for fifteen years or upwards, . . . resigns his office, His Majesty may . . . grant unto such Judge an annuity equal to two-thirds of the salary annexed to the office he held at the time of his resignation.” There is no qualification as to infirmity coupled with the above provision. It is an absolute right (under His Majesty) to superannuation, and is given as a return for a continuous service of fifteen years.

There is, moreover, a further point, which the critics have failed to note. When a lawyer of high standing and in large practice accepts a Judgeship, he makes a sacrifice of income by so doing. This applies to the whole period of time that he is on the Bench. In other words, he commutes his income for a hat period; and the Act fixes fifteen years as being a reasonable time for such commutation. Why, then, after fifteen years of public service, at a comparatively small income, should he not feel himself free to take up any work he desires. He might, following distinguished precedents, have gone back to the profession, but, instead, he went forward to the very highest legal position.

The country had previously been, and is again now, well served by having as Minister of Justice and Attorney-General one whose judicial experience is of very great value. In the

case of the present Minister, mature judgment is aided by a keen acumen most necessary in the official legal adviser of the Governor-General and the legal member of His Majesty's Privy Council for Canada.

"THE LAW OF THE CASE."

Whether wisely or unwisely, the system of Anglo-Saxon jurisprudence is built upon precedent rather than upon principle, and a decision of a court of last resort once made, whether in conformity with well-recognized principles of law supposed to guide courts in arriving at their conclusions, or in flagrant violation of all known principles, becomes the "law of the land" for that jurisdiction, especially where the court conceives that it may have become a "rule of property;" and we seem to be fast arriving at that stage in the development and decline of the Roman civil law when in its decadence, the "Law of Citation" was enacted, and which, in the time of the Glossators, degenerated into the "Rule of Thumb;" when the lawyers, chained by tradition and cramped by the demands of daily practice, were quite satisfied with a stale rehashing of well-known ideas, and sought only for illustrative cases which were supposed to explain some legal principle—but which frequently leave the ruling doctrine as much muddled and uncertain as ever. The legal profession and the bench, alike, becoming blind victims of the fetish of authority-worship, developed the rule of taking for law whatever some authority had once asserted, and, when there were opposing opinions on record, deciding by the mere number of opinions upon one side or the other, without giving any consideration to the learning and rectitude of the man or the justness of the opinion. Dogma and authority-worship having superseded reason and science, the doctrine of "*communis opinio*," or the weight of opinion, that is, the rule that the recorded opinion which had the greater number of adherents was the sound one, prevailed. Under this rule the judge decided, not by the aid of his own knowledge and reflection and reasoning, but by following that opinion which numbered amongst its adherents a majority of

accredited names, and when the number was even, Papinion's name controlled. Later, when Accussius rose to fame, while his star remained in the ascendant, his opinion was treated as the law, in the absence of an express statute or established custom on the subject; and a statute was enacted that Dinus' opinion should stand as the law in all those cases where, on a given point, Accussius had expressed two opposite opinions. Afterwards Bartolus came into fame, and his opinion supplanted that of Accussius.

At this time, when the product of Roman juristic thought had passed its prolific and brilliant stage, the law schools of the time, the sole aim of which was to prepare practitioners, followed the trend of the times and filled the minds of their students with the "rule of thumb." The law schools of this country to-day seem to have fallen into the same decadence and, with a single exception, chained to blind precedent, seek to teach the law by the study of "selected cases"—which at best can apply fundamental principles and general rules of law in a limited degree only, dependent upon the particular facts and restricting circumstances in each particular case—instead of seeking to have their students master those fundamental principles in the various branches of American jurisprudence which must, or should, control all cases, however variant the facts; concentrate the entire time and attention of the students upon the "stupendous accumulation of judicial detritus which threatens our entire legal system with a menace that must not be underestimated," instead of endeavoring to develop in the minds of the students a comprehensive knowledge of the science of the law logically by inculcating fundamental principles and the method of their proper application to a given state of facts.

In this country a decision in a cause submitted to the highest court of a jurisdiction—state or nation—once made is as unalterable as the laws of the Medes and Persians, so far as that cause is concerned, for it is the invariable rule, in states and nation, alike, that a question once considered and decided by a final appellate court, cannot be re-examined at any subsequent stage of the same cause; such decision becomes the "law of the case" and is final, so long as the facts remain unchanged and the evidence substan-

tially the same; a second appeal is authorized where the cause is remanded and a new trial ordered, but such second appeal brings up for consideration by the appellate court such things only as occurred subsequently to the order of remand, and does not authorize an inquiry into and an examination anew into the merits of the original judgment, decree or order, or into any questions which were properly before the court on the first appeal, or could have been properly presented to the court on that appeal.

Concisely stated, the doctrine of "the law of the case" is that an adjudication by a final court of appeal becomes the law of the case upon all subsequent trials thereof and proceedings therein, and is regarded as a wholesome rule and should be enforced, where no new proof is introduced at the retrial on remand; but questions of fact are not within the rule, and anything an appellate court may have said in respect thereto on a former appeal cannot bind the trial court on a retrial. From this it follows that where an appellate court states a principle or rule of law necessary to the decision—and some of the cases go even farther than this; but they are not thought to be sound in so holding—that principle or rule of law must be adhered to in all subsequent proceedings in that cause, unless the facts on the retrial are substantially different from those on the first trial, and such former decision is to be followed in its spirit as well as its letter, even though in a subsequent consideration of the case the judges of the appellate court are convinced that their former decision was fundamentally erroneous.

This rule, in all its strictness, applies, however, it seems, in those cases only in which the judges of the appellate court agree upon questions of law; for if they fail to so agree the decision does not become the law in the case, and cannot serve as a rule or guide to the lower court upon the retrial of the cause.

On second appeals the final court of appeals is subject to and bound by this rule the same as the trial courts, and must apply and enforce the decision in the first appeal in its spirit as well as its letter, even though additional assignments of error are made raising, upon the second appeal, questions which were not presented on the first appeal. The rule, however, is inapplicable

in all those cases in which the facts proved at the retrial, and presented on the subsequent appeal, are materially different from those proved at the first trial and presented on the first appeal and on which the decision was founded: *e.g.*, where on the retrial after remand the issues were changed and much of the evidence admitted on the first trial was excluded on the retrial, in which case the decision of the appellate court on the first appeal is not the law of the case on the second appeal.

The rule of the law of the case does not apply in all its force to inferior appellate courts, and hence a decision of a district court of appeal, or other intermediate appellate court, is not the law of the case on appeal to the supreme court or other higher court of appeal; it is binding on the trial court and other inferior courts, only.

In a California case, where the cause had been appealed to the district court of appeal, was remanded for a retrial, again appealed to the district court of appeal, and taken from there to the supreme court, the latter court held that the decision of the district court of appeal on the first appeal was not the law of the case on a subsequent appeal to the supreme court. Among other interesting things the California Supreme Court say: "Appellate's contention is that upon the former appeal the evidence then and there before the appellate court was reviewed and declared to be sufficient to sustain certain findings; that upon the same evidence the trial court again made the same findings, when in point of law it should have been controlled in its determination upon these matters by the utterances of the appellate court in discussing the evidence upon the former appeal. In this, the appellant mistakenly seeks unwarrantably to extend the doctrine of the law in the case. The doctrine of the law of the case presupposes error in the enunciation of a principle of law applicable to the facts of a case under review by an appellate tribunal. It presupposes error because, if the governing principle of law had been correctly declared, there would be no occasion for the intervention of the doctrine. The sole reason for the existence of the doctrine is that the court, having announced a rule of law applicable to a retrial of facts, both parties upon that retrial are assumed to have con-

formed to the rule and to have offered their evidence under it. Under these circumstances it would be a manifest injustice to either party to change the rule upon the second appeal. But, since the rule owes its very existence to error, it is not one whose extension is looked upon with favor. The ruling is adhered to in the single case in which it arises, is not carried into other cases as a precedent, and the doctrine is rarely, and in a very limited class of cases, applied to matters of evidence, as distinguished from rulings at law. The narrow class of cases in which the doctrine will be held to apply to evidence and the rigid limitation upon the application of the doctrine, will be found well expressed in *Wallace v. Sisson*. It is there said: 'But when the fact which is to be decided depends upon the credit to be given to the witnesses whose testimony is received, on the weight to which their testimony is entitled or the inferences of fact that are to be drawn from the evidence, the sufficiency of the evidence to justify the decision must be determined by the tribunal before which it is presented, and is not controlled by an opinion of the appellate court that similar evidence at a former trial of the cause was insufficient to justify a similar decision. . . . And if, in the opinion which it renders, it assumes that the evidence sustains any fact, it is only the opinion of the court, and not the finding of that fact.'"—*Central Law Journal*.

REVIEW OF CURRENT ENGLISH CASES.

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APPEAL TO KING IN COUNCIL—COSTS—APPEAL IN FORMA PAUPERIS—COSTS OF PETITION FOR SPECIAL LEAVE.

Levine v. Serling (1914) A.C. 665. This was a case in which an application was made for special leave to appeal to His Majesty in Council in *formâ pauperis*, which was granted. The appeal proved successful, and the appellant was awarded costs, and the question arose whether he was entitled to divers costs of the application for leave to appeal incurred prior to the making of the order allowing him to appeal in *formâ pauperis*, and the Judicial Committee (Lords Haldane, L.C., Moulton, and Sumner) held that he was.

“ACCIDENT”—MEANING OF—WORKMEN’S COMPENSATION ACT—PREMEDITATED ASSAULT.

Board of Trim District School v. Kelly (1914) A.C. 667. This was an action brought under the Workmen’s Compensation Act by the representatives of a deceased assistant master in the defendants’ school, who had been killed, while discharging his duties, as the result of a preconcerted attack made on him by some of the pupils. The question was whether his death was due to “accident” within the meaning of the Act. A majority of the House of Lords (Lords Haldane, L.C., Loreburn, Shaw, and Reading) held that it was; but Lords Dunedin, Atkinson, and Parker, dissented. In the result the decision of the Irish Court of Appeal was affirmed.

WILL — CONSTRUCTION — DEVISE “NEAREST MALE HEIR” — “NEAREST AND ELDEST MALE RELATIVE”—VESTING—POSTPONEMENT OF VESTING—INTESTACY.

Lightfoot v. Maybery (1914) A.C. 782. This was an appeal from the decision of the Court of Appeal (1913) 1 Ch. 376 (noted *ante* vol. 49, p. 302) affirming a judgment of Joyce, J. (1912) 2 Ch. 430 (noted *ante* vol. 48, p. 693). In the Courts below the case was known as *In re Watkins, Maybery v. Lightfoot*. The case turns upon the construction of a will whereby the testator, a bachelor, devised land in trust for his brother Herbert for life, and after his decease to convey it to his (the testator’s) “nearest

male heir, and should there be two or more in equal degrees of consanguinity to me . . . then to convey the same unto the eldest of my male kindred" for life, "with remainder to the heirs of the body of my said eldest male relative." The testator bequeathed his residue to Herbert for life, and expressed a desire that he should not mortgage or anticipate the same, but assist the trustee in keeping the real estate in such repair as might be necessary for preserving its value, and keeping up the remainder in trust for "my nearest and eldest male relative" who should be such at the death of Herbert. The defendant was the heiress at law of the testator both at his death and at the death of Herbert. The nearest male relative of the testator at his death was the son of a female first cousin, and at the time of Herbert's death was the plaintiff, a son of a daughter of the same cousin. The majority of the Court of Appeal held that the person entitled in remainder must be ascertained at the testator's death in accordance with the established rule in favour of early vesting. Buckley, L.J., on the contrary, was of the opinion that "my nearest male heir" meant the testator's nearest male relative at the time of the death of Herbert. The House of Lords (Lords Loreburn, Atkinson, Shaw, and Moulton) hold that the words "nearest male heir" were not used in a technical sense as meaning the testator's heir being a male, but meant the testator's nearest male relative, and they agreed with Buckley, L.J., that the person to take in remainder was to be ascertained at the death of the tenant for life, and that the plaintiff's grandfather, being at that time the testator's nearest male relative, was entitled in remainder. The judgment of the Court of Appeal was therefore reversed. It was argued for the defendant that the words meant the "heir if a male," and, there being no such person, there was an intestacy, but this view failed to commend itself to their Lordships.

SOLICITOR AND CLIENT—CLAIM FOR INDEMNITY—MISREPRESENTATION — IMPROPER ADVICE — FRAUD — NEGLIGENCE — PLEADING—CAUSE OF ACTION.

Nocton v. Ashburton (1914) A.C. 932. This was an action brought by the plaintiff (Ashburton) against the defendant, who had acted as his solicitor, claiming indemnity for a loss occasioned by following the advice of the defendant in releasing certain property from a mortgage held by the plaintiff. The statement of claim charged misrepresentation and fraud. At the trial, Neville, J., found that the charge of fraud had not been made out, and, on that ground, dismissed the action. The Court of Appeal

found that fraud had been made out, and gave relief on that basis. The House of Lords (Lords Haldane, L.C., Dunedin, Atkinson, Shaw, and Parmoor) came to the conclusion that the Court of Appeal was not justified in reversing the finding of Neville, J., on the question of fraud; but their Lordships also held that although fraud had not been established yet that the plaintiff was not thereby precluded from claiming and getting relief on the footing of breach of duty arising out of the relationship of solicitor and client, and on that ground they affirmed the judgment of the Court of Appeal, being of the opinion that the evidence established that the defendant had as a solicitor failed in his duty to the plaintiff in advising the release of the property in question.

COVENANT IN RESTRAINT OF TRADE—CONSTRUCTION—BREACH OF COVENANT—BUSINESS OF HOUSE AGENT—"CARRYING ON BUSINESS."

Hadsley v. Dayer-Smith (1914) A.C. 979. This action was to restrain the breach of a covenant in restraint of trade. The plaintiff and defendant had formerly carried on business together as house agents in partnership under articles which provided that an outgoing partner should not, for a period of ten years after dissolution, carry on or engage or be interested directly or indirectly in any similar business within a radius of one mile of the partnership business. The defendant withdrew from the partnership and started a similar business on his own account at an office outside of the prohibited radius. In the course of his business he endeavoured to let two houses within the prohibited radius, on which he placed boards directing intending tenants to apply to him at his office, and also inserted advertisements relating to the letting of such houses in newspapers. The Court of Appeal held, reversing the judgment of Eve, J., on a motion for an injunction, that these acts amounted to a breach of the covenant; and the House of Lords (Lords Dunedin, Atkinson, Shaw, Sumner, and Parmoor) affirmed the decision of the Court of Appeal.

CANADIAN RAILWAYS—TRAFFIC BETWEEN CANADA AND UNITED STATES—TARIFFS—RAILWAY COMMISSIONERS—JURISDICTION—DECLARATORY ORDER—DOMINION RAILWAY ACT (R.S.C. c. 37), ss. 26, 321, 336, 338.

Canadian Pacific Ry. v. Canadian Oil Co. (1914) A.C. 1022. This was an appeal from the Supreme Court of Canada affirming a judgment of the Railway Commissioners. The facts were, that in respect of railway traffic carried by a continuous route

from points in the United States into Canada a joint tariff was filed with the Railway Commissioners, under s. 336 of the Railway Act (R.S.C. c. 37) making use of a classification in use in the United States as permitted by s. 321 (4) of the Act; and the Railway Commissioners had made an order declaring that such tariff could not be altered or superseded by a tariff using a classification neither in use in the United States nor sanctioned by the Railway Commissioners; which order the Supreme Court affirmed, holding that the Commissioners had authority to make it under s. 26 of the Railway Act, as to a rate illegally charged, even though the company had withdrawn the objectionable tariff before the order was made. The Judicial Committee of the Privy Council (Lords Haldane, L.C., Dunedin, Moulton, Parker, and Sumner) affirmed the judgment of the Supreme Court.

NEGLIGENCE—DEATH—ACTION FOR BENEFIT OF FAMILY OF DECEASED—TIME FOR COMMENCING PROCEEDINGS—FATAL ACCIDENTS ACT—(R.S.O. c. 151), s. 6.

British Electric Ry. Co. v. Gentile (1914) A.C. 1034. This was an action brought under the British Columbia Act, which is the equivalent of the Fatal Accidents Act (R.S.O. c. 151), against a railway company to recover damages for the death of an employee. The defendants operated a tramway under power conferred by a provincial statute which provided that actions against the company for indemnity for any damage or injury sustained by reason of the tramway or the operations of the company were to be brought within six months from the act complained of. The statute under which the plaintiff sued required (as does the Ontario Act, s. 6) that the action should be commenced within twelve months after the death of the deceased. The action was brought within the last mentioned period, but more than six months after the accident. The Judicial Committee of the Privy Council (Lords Dunedin, Moulton, and Parker, and Sir George Farwell) agreed with the Court of Appeal of British Columbia that the action was brought in time, and in doing so disapproved of *Markey v. Tolworth* (1900) 2 Q.B. 544. This decision, therefore, supports the opinion expressed in *Zimmer v. Grand Trunk Ry.*, 19 Ont. App. 693. Their Lordships hold that the causes of action under the two Acts are different.

RAILWAY—EXPROPRIATION OF LAND—COMPENSATION FOR LANDS TAKEN—MINERALS—RIGHT OF SUPPORT—RAILWAY ACT (R.S.C. c. 37), ss. 155, 170, 171.

Davies v. James Bay Ry. (1914), A.C. 1043. This was an

appeal from the judgment of the Court of Appeal for Ontario reducing the amount awarded by arbitrators for land expropriated for the purpose of a railway. The land expropriated included a bed of shale, and if the owners were entitled to compensation therefor it was agreed the award was to be for \$230,820, and if not then only for \$119,831. The Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Loreburn, Moulton, and Sumner, and Sir Geo. Farewell) point out that the provisions of the Canadian Railway Act differ from those of the English Railway Clauses Consolidation Act (1845) in that under the Canadian Act a company acquiring the surface has a right to support from minerals under and adjacent to the land expropriated, whereas under the English Act the expropriators do not acquire a right to support unless such right is expressly bought and paid for. Their Lordships therefore dissented from the judgment of the Court of Appeal, and held that the owner was entitled to the larger sum.

COMPENSATION—GRANT OF LAND TO SOCIETY SUBJECT TO A CONDITION FOR RESUMPTION—LIMITATION OF RIGHT TO CONVEY—RESUMPTION—VALUE OF LAND.

Corrie v. MacDermott (1914) A.C. 1056. This was an appeal from the judgment of the High Court of Australia given on an appeal from an award in the following circumstances. The Crown had granted to trustees for the Acclimatization Society of Queensland certain land, to be used only for the purposes of the society, but with power to sell the land only to the local authority for a park or to a certain agricultural association the proceeds to be invested and the income used for the purposes of the society. The grant also provided that the Government might resume possession, "paying the value of the land." The Government exercised this right, and the question was on what basis the value of the land was to be ascertained. The Australian Court held that the trustees were entitled to be paid the full value of the land without regard to the restrictions on the trustees' rights in the land, but the Judicial Committee of the Privy Council (Lords Dunedin, Atkinson, and Sumner, and Sir Joshua Williams) dissented from this view, and held that the value must be ascertained having regard to the restricted rights on which the trustees held the land.

Reports and Notes of Cases.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Lord Chancellor Haldane, Lord Moulton,
Lord Sumner, Sir Chas. Fitzpatrick, [November, 1914.
Sir Joshua Williams.] 18 D.L.R. 353.

JOHN DEERE PLOW CO. v. WHARTON.

1. *Constitutional law—Construction—Application of federal constitution to provinces—Self-executing provisions—B.N.A. Act.*

The British North America Act being founded upon a political agreement, the judicial interpretation of sections thereof stating the distribution of legislative power between the provinces and the Dominion should be limited to concrete questions which are in actual controversy from time to time without entering upon a general interpretation of the Act, the form of which shews that it was intended to leave the interpretation of seemingly conflicting provisions to practice and judicial decision.

Citizens v. Parsons, 7 A.C. 109, and *Attorney-General v. Colonial Sugar Refining Co.*, [1914] A.C. 254, applied.

2. *Constitutional law—Federal and provincial rights—"Civil rights in the province"—Construction of B.N.A. Act.*

The expression "civil rights in the province" as used in the confirming of provincial powers in sec. 92 of the British North America Act is to be construed as excluding cases expressly dealt with elsewhere in secs. 91 and 92.

3. *Corporations and companies—Franchises—Federal and provincial rights to issue—B.N.A. Act.*

The power of legislating with reference to the incorporation of companies in Canada with other than provincial objects belongs exclusively to the Parliament of Canada as a matter affecting the "peace, order and good government of Canada" under sec. 91 of the British North America Act.

4. *Corporations and companies—Governmental regulation—Companies with objects extending to the entire Dominion—Federal and provincial powers—Right to sue, whence derived.*

The legislative power to regulate trade and commerce which by sec. 91 of the British North America Act belongs to the Dominion Parliament enables the latter to prescribe to what extent the powers of trading companies which it incorporates with objects extending to the entire Dominion should be exercisable and what limitations should be placed on such powers; and sesc. 5, 29, 30 and 32 of the Companies Act (Can.) and sec. 30 of the Interpretation Act, 1906 (Can.), purporting to enable any federal company incorporated under the Companies Act of Canada to sue and be sued and to contract in the corporate name and establishing the place of its legal domicile and declaring the limitations of personal liability of the shareholders are within the legislative powers of the Parliament of Canada.

5. *Corporations and companies—Creation; franchises; Government regulation—Federal company, how affected by provincial law—Companies Act of Canada—B.C. Companies Act.*

The provisions of British Columbia Companies Act in so far as they purport to compel a trading company incorporated under the Companies Act of Canada with powers extending throughout the whole of Canada to take out a provincial license as a condition of exercising such corporate powers in British Columbia, and of suing in the courts of that province, are *ultra vires*.

Wharton v. John Deere Plow Co., 12 D.L.R. 422, reversed; *John Deere Plow Co. v. Duck*, 12 D.L.R. 554, reversed; *Re Companies Act*, 48 Can. S.C.R. 331, 15 D.L.R. 332, considered.

6. *Corporations and companies—Federal company—How affected by provincial laws of general application—B.N.A. Act.*

A company incorporated by the Dominion with powers to trade is not the less subject to provincial laws of general application enacted under sec. 92 of the British North America Act.

Union Colliery Co. v. Bryden, [1899] A.C. 580; *Colonial Building Association v. Attorney-General*, 9 A.C. 157; *Bank of Toronto v. Lambe*, 12 A.C. 575, and *Citizens v. Parsons*, 7 A.C. 96, referred to.

These were consolidated appeals from judgments of B.C. Supreme Court, *Wharton v. John Deere Plow Co.*, 12 D.L.R. 422, and *John Deere Plow Co. v. Duck*, 12 D.L.R. 554.

The appeals were allowed.

E. L. Newcombe, K.C., for Attorney-General of Canada. *Sir Robert Finlay*, K.C., and *Geoffrey Lawrence*, for Attorney-General for British Columbia. *F. W. Wegenast*, for appellant company. *E. Lafleur*, K.C., and *Raymond Asquith*, for respondents.

ANNOTATION ON ABOVE CASE, TAKEN FROM DOMINION
LAW REPORTS.

Ontario was the first province to put in force an Act requiring extra-provincial corporations to obtain a license before carrying on business within the province and imposing disabilities for non-compliance with its provisions. This Act, passed in 1900, was followed by similar Acts in all of the other provinces, excepting Prince Edward Island, in which province provision is made for an annual tax upon all such companies, but non-payment of the tax does not involve disabilities. Of the Acts of these provinces it is to be noted that every one excepting that of Quebec includes within its terms companies incorporated by the Dominion, and requires such companies to obtain provincial authority before being allowed to carry on business within the province or sue in the provincial Courts. Such provincial authority was provided to be given by way of a license, upon complying with certain formalities and payment of certain fees, and in most cases it was discretionary whether or not the license should issue. Nova Scotia was the last province to impose disabilities for failure to comply with the provisions of the Act. Quebec expressly excepted Dominion companies from the operation of the Act.

From the time that the earliest Act was passed great doubt has been expressed by lawyers as to the validity of the provisions which denied to Dominion companies the right to exercise within the province the powers conferred upon them by the Dominion until they complied with the licensing provisions imposed by the province. But the provincial Courts have been unanimous in upholding their validity, as in cases such as *Ireland v. Andrews* (1904), 6 Terr. L.R. 86; *Rex v. Massey-Harris* (1905), 6 Terr. L.R. 126, 9 Can. Cr. Cas. 25; *Waterous Engine Works v. Okanagan Lumber Co.* (1908), 14 B.C.R. 238; *Semi-Ready v. Hawthorne* (1909), 2 A.L.R. 201.

Although the matter was one of great importance to the business community, it was not until the case under consideration reached the Judicial Committee that that Committee had an opportunity of considering the respective powers of the Dominion and the provinces as to the incorporation of companies. The case itself is fortunate in its facts as they were such as to bring the question of provincial licensing of Dominion companies squarely before the Courts for decision. The appellant company, incorporated as it was by the Dominion, had applied to the Registrar of Joint Stock Companies in British Columbia for a license under the Provincial Act, had offered to pay all the required fees, but was refused a license on the ground that the name of the company unduly conflicted with the name

of a company already registered in the province. So that we have the case of a company empowered by the Dominion to transact business throughout Canada under a certain name, and yet prohibited by one of the provinces from transacting its business within that province and from using its Courts unless it changed that name (and paid fees, etc.). Here, then, was undoubted interference of the province with the powers given by the Dominion.

The gist of the Judicial Committee's decision is to be found in the following words: "The province cannot legislate so as to deprive a Dominion company of its status and powers." It is to be carefully noted that all the Acts of the type of the British Columbia Act provide, in effect, that obtaining a license is a condition precedent to the right of the company to carry on business within the province, or to sue in the provincial Courts. Obviously this deprived Dominion companies both of their status and their powers, and the Judicial Committee, accordingly, proceeds to find all such legislation beyond the power of the provinces.

The case is the first one in which the Judicial Committee has given its opinion respecting the power of the Dominion over the incorporation of companies, and it finds in a very clear and logical manner that the Dominion has full power to incorporate companies with objects other than provincial, and with power to trade throughout the Dominion. The second point in the decision is that no province can impose upon such companies any conditions, restrictions, or taxes *as a condition precedent* to trading within the province.

But it is submitted that the judgment does not go so far as to hold that it is beyond the power of the province to impose a tax upon Dominion companies as such. The legislation under consideration was a prohibition to Dominion companies from trading in the province until they complied with the provincial requirements, and the payment of a fee was only one of those requirements. The provinces have express and exclusive power under sec. 92(2) of the B.N.A. Act to make laws in relation to "direct taxation within the province in order to the raising of a revenue for provincial purposes," and it is submitted that it is competent to the provinces under this decision to impose a tax for revenue purposes upon Dominion companies. But that tax must be clearly for revenue purposes and not for the purpose of requiring Dominion companies to obtain provincial sanction for the exercise of their corporate powers. This was the view of Mr. Justice Anglin in *Re Companies*, 48 Can. S.C.R. 331 at 460, 15 D.L.R. 332 at 340, 341. And it is submitted that the ordinary methods of recovering payment of the tax such as by suit or distress can be adopted. But payment of the tax must not be a condition upon which the company is allowed to trade within the province.

It is to be noted that the Judicial Committee again expresses disapproval of the consideration of any abstract questions under sections 91 and 92 of the B.N.A. Act. Appreciation is expressed of the careful judgments delivered by the Supreme Court in the *Companies Case*, 48 Can. S.C.R. 331,

15 D.L.R. 332, but the significant remark is made that their Lordships' task was an impossible one. In view of this it is doubtful whether an appeal from the judgment of the Supreme Court will be of any substantial value.

Apart from the importance of the judgment in relation to Dominion corporations the case itself takes a leading position in the long line of cases decided by the Judicial Committee upon the difficult questions arising under the B.N.A. Act. And the decision appears to depart in no particular from the rules laid down by the Committee for the construction and interpretation of the apparently interlocking sub-sections of sections 91 and 92.

G. M. CLARK.

Domínion of Canada.

SUPREME COURT.

N.S.]

CITY OF HALIFAX v. TOBIN. [Nov. 10, 1914.

Negligence—Municipality—Misfeasance.

The corporation of Halifax in laying a concrete sidewalk on a street broke up a portion of the asphalt sidewalk of a street crossing it and filled the hole made with earth and ashes. The rain washed away the filling and T. was injured by stepping into the hole.

Held, affirming the judgment appealed from (47 N.S. Rep. 498), that the corporation was guilty of misfeasance and a verdict in favour of T. should stand.

Appeal dismissed with costs.

J. H. Bell, K.C., for appellant. Newcombe, K.C., and Kenney, for respondent.

Man.]

[Nov. 30, 1914.

GRAND TRUNK PACIFIC RY. CO. v. PICKERING.

Operation of railway—Transfer of cars—Interswitching—Duty of train crew—Negligent coupling—Scope of employment—Employers' liability—Practice—Questions for jury—Judge's charge.

A train crew of defendants while performing their duty in the transfer yard of another railway company were directed by the yardmaster to remove a special car of freight which was to be transferred to the defendants' railway from amongst a number of other cars in the yard. In order to do so it was necessary to shunt several cars placed in front of the car to be transferred,

and the train crew switched these cars to certain tracks on which there was then standing a train of the other railway company, headed by an engine under which the fireman, plaintiff, was then working. They undertook to couple the cars which they were switching to the standing train, as a matter of convenience, and, in doing so, struck the rear of the train with such force as to move the engine and cause injuries to the fireman who was working under it. Specific questions were not submitted to the jury, notwithstanding suggestions made by defendants' counsel after the Judge had charged them, and they returned a general verdict in favour of the plaintiff.

Held, affirming the judgment appealed from (24 Man. R. 544), that in so proceeding to couple the cars they had switched on to the standing train the defendants' train crew were still acting within the scope of their employment, and, as they performed the work in a negligent manner, the defendants were liable in damages for the injuries caused to the plaintiff.

Per ANGLIN, J.:—As counsel for defendants requested certain questions to be put to the jury only after the Judge had charged the jury and having regard to the scope and character of the questions suggested and to the Judge's charge, there was no miscarriage of justice resulting from the Judge's failure to require the jury to answer specific questions.

In charging the jury the Judge made no reference to evidence by which it was attempted to shew that the plaintiff had been guilty of contributory negligence in disregarding an operating rule of the company by which he was employed respecting signals to be used on engines about which workmen were employed; no objection was taken to the charge on this ground, nor was the Judge asked to direct the attention of the jury to the rule.

Held, per ANGLIN, J.:—There was no reason why the judgment appealed from should be disturbed on this ground.

Appeal dismissed with costs.

J. B. Coyne, for the appellants. *W. H. Trueman*, for the respondent.

Ont.]

[Nov. 30, 1914.]

CAMPBELLFORD, ETC., RY. CO. v. MASSIE.

Expropriation—Agreement to fix compensation—Arbitration or valuation—Powers of referees—Majority decision.

Where the land was expropriated for railway purposes the railway company and the owner agreed to have the compensation

determined by referees to three named persons called "valuers" in the submission; their decision was to be binding and conclusive on both parties and not subject to appeal; they could view the property and call such witnesses and take such evidence, on oath or otherwise, as they, or a majority of them, might think proper; and either party could have a representative present at the view or taking of evidence, but his failure to attend for any reason would not affect the validity of the decision.

Held, FITZPATRICK, C.J., and DUFF, J., dissenting, that this agreement did not provide for a judicial arbitration but for a valuation merely by the parties to whom the matter was referred, of the land expropriated.

The agreement provided that a valuator should be appointed by each party and a County Court Judge should be the third; if one of those appointed would or could not act the party who appointed him could name a substitute; if it was the third the parties could agree on a substitute, in which case the decision of any two would be binding and conclusive without appeal; if they could not so agree a High Court Judge could appoint. There was no necessity for substitution.

Held, that the decision of any two of the valutors was valid and binding on the parties.

Appeal dismissed with costs.

W. N. Tilley, for appellants. *H. Cassels*, K.C., for respondent.

Ont.] HALTON BRICK CO. v. McNALLY. [Dec. 29, 1914.

Negligence—Industrial company—Defective system—Knowledge of managing director—Liability of company.

M., an employee of the defendant company, was engaged in wheeling bricks into a kiln where he had to hand or throw them to men engaged in piling. When the pile became high a quantity of the bricks fell on M., who was killed. In an action by his widow against the company, it was proved that the floor of the kiln was very uneven, and that planks used to brace the pile when it was high were not in place when the accident occurred.

Held, that as it was shewn that the managing director of the company was aware of the condition of the floor his knowledge was that of the company; on which ground, and because he had not directed the prop to be maintained which the jury found as negligence, the company was liable.

Appeal dismissed with costs.

DuVernet, K.C., for appellants. *Guthrie*, K.C., and *Dick*, for respondents.

Que.]

[Dec. 29, 1914.]

CANADIAN NORTHERN RY. CO. v. SMITH.

Appeal—Expropriation—Application to appoint arbitrator—Persona designata—Amount in controversy.

A railway company served notice of expropriation of land on the owner, offering \$25,000 as compensation. It later served a copy of said notice on S., lessee of said land for a term of ten years. On application to a Superior Court Judge for appointment of arbitrators, S. claimed to be entitled to a separate notice and an independent hearing to determine his compensation. The Judge so held and dismissed the application, and his ruling was affirmed by the Court of King's Bench. The company sought to appeal to the Supreme Court of Canada.

Held, per FITZPATRICK, C.J., and IDINGTON, J., following Canadian Pacific Ry. Co. v. Little Seminary of Ste. Thérèse, 16 S.C.R. 606, and St. Hilaire v. Lambert, 42 S.C.R. 264, that the Superior Court Judge was persona designata to hear such applications as the one made by the company; that the case, therefore, did not originate in a superior Court and the appeal would not lie.

Held, per DAVIES, DUFF, ANGLIN, and BRODEUR, JJ., that there was nothing in the record to shew that the amount in dispute was \$2,000 or over, and no attempt had been made to establish by affidavit that it was the appeal failed.

Appeal quashed with costs.

Casgrain, for the motion. Rinfret, K.C., contra.

Book Reviews.

Words and Terms Judicially Defined. By HIS HONOUR JUDGE WIDDIFIELD. Toronto: The Carswell Co., Limited. 1914.

A very timely and useful collection. The words and terms are to be found in the judgments of Canadian and Provincial Courts, from which they have been dug out and placed in accessible form. As far as possible the exact language of the judgment has been followed, and enough of the context of facts set out to enable the reader to judge how far the definition may apply to his own case. The book shews great industry and research on the part of the learned Judge, and will be a useful addition to a lawyer's library.

The Formal Bases of Law. By GIORGIO DEL VECCHIO, Professor of Philosophy of Law in the University of Bologna. Translated by JOHN LISLE of the Philadelphia Bar. Boston: The Boston Book Company. 1914.

This is Volume 10 of the Modern Legal Philosophy Series. The editorial preface by Joseph H. Drake of the University of Michigan and an introduction by Sir John Macdonell and Shepard Barclay are valuable aids to the study of an abstruse subject which is in the nature of things theoretical. The writer has a wide reputation as a writer on philosophical subjects; but whilst one might regret that so few have the ambition to study such books, their sale must be limited to the few.

Polarized Law. Three lectures on Conflicts of Law. By T. BATY, D.C.L., LL.D. London: Stevens & Haynes, 13 Bell Yard. 1914.

These lectures were delivered at the University of London. There is also given an English translation of the Hague Convention on private International Law. The author apologizes for what he thinks some may consider a fanciful name. It certainly does not convey much to the ordinary reader. Other descriptive names which he suggests are "Interlocking Laws," "The Harmonization of Law," "The Correlations of Law." These may help to give an idea of what the volume contains. International Law is not of much consequence at present. We trust that it may be again when Germany has been divided among the Allies; a consummation devoutly to be wished for.

Mens rea or Imputability under the Law of England. By DOUGLAS AIKENHEAD STROUD, LL.B. London: Sweet & Maxwell Ltd., 3 Chancery Lane. 1914.

The author states that the book has been written with the double object of presenting a comprehensive view of the main principles of imputability, and of furnishing a practical guide to the statute and case law in which those principles have been applied. The subject is largely one dealing with intention, and has, of course, a most important bearing upon criminality in law.

The statement that the maxim means "no more than that a definition of all, or nearly all crimes contains not only an outward and visible element but a mental element," has been severely criticized by Stephen, J., in *R. v. Tolson*, 23 Q.B.D. 185. The subject is really too complicated and extensive to be embraced

in one sentence. Stephen, J., says that the principle amounts to no more than that "the full definition of every crime contains expressly or by implication a proposition as to a state of mind. Therefore, if the mental element of any conduct alleged to be a crime is proved to have been absent in any given case, the crime as defined is not committed, or, again, if a crime is fully defined, nothing amounts to that crime which does not satisfy that definition."

This book is one that should be read carefully by every lawyer who, in his practice, has to do with any branch of criminal law. It is, moreover, a treatise interesting even to the general reader.

A Summary of the Law of Companies. By T. EUSTACE SMITH, Barrister-at-law. 12th Edition by the author and CHARLES HUBBARD HICKS. London: Stevens & Haynes, 13 Bell Yard. 1914.

The popularity of this summary is shewn by the appearance of a new edition every few years since 1878. It was at first intended for students, but is now largely used by solicitors and company officials. It forms an epitome of Company Law supplemented with a full index. Something of this sort adapted to our Company Law would be useful in this country.

Obituary.

JOHN ANDERSON ARDAGH, LATE SENIOR JUDGE OF THE COUNTY OF SIMCOE.

The county of Simcoe has, by the death of Judge Ardagh, lost one of its most prominent and respected citizens.

Mr. Ardagh was the son of the Rev. S. B. Ardagh of the city of Waterford, Ireland, and was born there September 18, 1835. His father emigrated to Canada in 1842 to take the incumbency of the parish and settlement of Shanty Bay, Lake Simcoe. About this time the church, in which his father officiated, was built, mainly through the efforts of the late Col. E. G. O'Brien and Captain Walker, whose daughter Judge Ardagh subsequently married.

He was educated at the Barrie Grammar School, and later took honours and his degree of M.A. at the University of Trinity College. He was called to the Bar in 1861. For a time he practised in Morrisburg, subsequently removing to Barrie, where he formed a partnership with his cousin, the late W. D. Ardagh, who was afterwards County Judge at Winnipeg. In 1869 he was appointed Deputy-Judge under Judge Gowan, who up to that

time had carried on, without aid, the arduous work of his large judicial territory, which included the districts as far north as the French River.

In October, 1872, he was appointed Junior Judge, and upon Judge Gowan's resignation in September, 1883, Judge Ardagh was promoted to the position of Senior Judge, and the late William F. A. Boys was appointed Junior Judge.

In October, 1912, Judge Ardagh retired from the Bench, having served his country well and faithfully for over forty years. During his long and active career he was closely identified with the affairs of the County, and no man commanded more genuine respect and admiration than did the late Judge Ardagh. His administrations of justice was satisfactory alike to both practitioners and litigants. He was a sound lawyer and a most conscientious, righteous Judge, and devoted to the duties of his office.

For many years Judge Ardagh was Chairman of the High School Board and Collegiate Institute, and always greatly interested in educational matters. In the early history of that district he contributed valuable papers to the local Historical Society. He was past President of the Simcoe County Law Association, and at the time of his death was Patron of the Society.

Judge Ardagh was a man of large heart and of a kindly nature. He contributed freely to philanthropic objects, and was deeply interested in all agencies for the spread of Bible truths, helping largely both foreign and home mission work. He leaves one daughter and two sons, B. Holford Ardagh, barrister, of Toronto, and H. V. Ardagh of Barrie. The funeral was a large and representative one.

Bench and Bar.

ONTARIO BAR ASSOCIATION.

The eighth annual meeting of the Ontario Bar Association was held on the 6th and 7th days of January last. This gathering was one of the most successful and interesting in the history of the Association. Mr. Frank M. Field, K.C., of Cobourg, the retiring president, presided. Sir George Gibbons, K.C., Honorary President, was also in attendance.

The President's address has already appeared in full in these columns, and has doubtless been read with much interest, reviewing, as it does, in a masterly manner, the work of the Association in the past, the present condition of legal matters as they affect the profession, and referring to the subjects which would come before the Association for discussion.

Sir George Gibbons expressed his appreciation of the honour bestowed upon him in succession to the late Mr. James Bicknell, K.C., and welcomed to the meeting various distinguished delegates from the United States: Honourable Frederick A. Henning of Washington, D.C., representing the American Bar Association; Hon. Mr. Justice Herbert P. Bissell of Buffalo, representing the New York State Bar Association; Frank T. Lodge of Detroit, representing the Michigan Bar; Mr. Eugene Lafleur and Mr. E. F. Surveyer, K.C., of Montreal, representing the Bar of Quebec; and Mr. Wm. Short, K.C., of Edmonton, representing the Alberta Bar. The various Judges of the Supreme Court Bench of Ontario, Hon. Mr. Justice Lennox, Hon. Mr. Justice Sutherland, the Hon. Mr. Justice Middleton, and the Hon. Mr. Justice Hodgins, were present on different occasions during the meetings.

At the close of the morning session various members of the Association and others in attendance were entertained at luncheon by the Treasurer and Benchers of the Law Society of Upper Canada.

The afternoon session opened with an excellent address by the Hon. Mr. Justice Lennox on "Bench and Bar," which contained many instructive criticisms and humorous sallies. One of the best papers of the gathering was given by Mr. Eugene Lafleur, K.C., on "International Law and the Present War." This able speaker was frequently applauded by a most attentive and interested audience. Reports of the standing committees were laid on the table, and included the subjects of Law Reform, Legal Ethics, and Legislation.

In the evening the annual banquet was held, Mr. Field presiding. Amongst those present were several of the Supreme Court Judges of Ontario, and some members of the Ontario Government and other distinguished guests. A most pleasant evening was spent, and was enlivened by a number of clever and entertaining speeches from several of the guests. We regret that want of space prevents further reference to them.

The proceedings on the second day commenced with a paper on Bankruptcy Law by Professor D. W. Amram of the University of Pennsylvania, which produced some discussion, and an interesting reminiscence of the student-at-law of the early sixties was given by Mr. J. E. Farewell, K.C., of Whitby.

A resolution was passed appointing a committee to draw up an address expressive of the valuable services of the Corresponding Secretary, Mr. R. J. MacLennan, and a resolution of the Executive Council in regard to an official organ was rescinded and it was decided not to recognize any journal as such.

As has been noted elsewhere, the Association undertook to endeavor to raise a fund of \$1,000 from the Bar of Ontario to provide a machine gun for the use of the Osgoode Hall Rifle Association, and the Council was also authorized to raise an equal sum for the relief of the Belgians.

The reports of the standing committees were referred to the Executive Council with the recommendation as to the possibility of calling another meeting of the Association to deal with them.

The meeting closed with the election of the following officers and representatives:—

OFFICERS.

Honorary President: Sir George Gibbons, K.C., London.

President: W. J. McWhinney, K.C., Toronto.

Vice-Presidents: Geo. C. Campbell, Toronto; A. E. H. Creswicke, K.C., Barrie; J. E. Farewell, K.C., Whitby.

Recording Secretary: C. F. Ritchie, Toronto.

Corresponding Secretary: R. J. Maclellan, Toronto.

Treasurer: C. A. Moss, Toronto.

Historian and Archivist: Col. W. N. Ponton, K.C., Belleville.

REPRESENTATIVES.

Past Presidents: A. H. Clarke, K.C., Calgary; Hon. Mr. Justice Hodgins, Toronto; S. F. Lazier, K.C., Hamilton; Charles Elliott, Toronto; W. C. Mikel, K.C., Belleville; M. H. Ludwig, K.C., Toronto; F. M. Field, K.C., Cobourg.

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Other Members: H. A. Burbidge, Hamilton; R. T. Harding, Stratford; J. J. Drew, K.C., Guelph. Twelve additional representatives to be elected at the first meeting of the Council.

JUDICIAL APPOINTMENTS.

CANADA.

Hon. Sir Francois Xavier Lemieux, one of the Puisne Judges of the Superior Court for the Province of Quebec, to be Chief Justice of such Court vice Sir Charles Peers Davidson, resigned. (February 2, 1915.)

Farquhar Stuart Maclellan, of the City of Montreal, K.C., to be a Puisne Judge of the Superior Court in and for the Province of Quebec. (February 3, 1915.)

John Kelley Dowsley, of the Town of Prescott, in the Province of Ontario, K.C., to be the Judge of the County Court of the United Counties of Leeds and Grenville. (January 29, 1915.)

ENGLAND.

Sir John Eldon Bankes, one of the Justices of the King's Bench Division, has been appointed one of the Lords' Justices of Appeal, taking the place of the late Lord Justice Kennedy. Sir Frederick Low, K.C., has been appointed one of the Justices of the High Court of Justice, replacing Sir John Eldon Bankes in the King's Bench Division.

War Notes.

THE UNITED STATES.

A correspondent in the United States, in speaking of a possible raid upon Canada from German reservists, says: "The situation which we have to deal with is not the usual situation of war. The Germans, owing to their repeated failures in the war, are stung to a mad fury, and care nothing what they do so long as it gratifies their insane passion for vengeance. We are dealing with madmen, and not with ordinary enemies." He also says: "The feeling in the United States is all that could be wished. The leading newspapers from the Atlantic to the Pacific are unanimous in their denunciations of the German Propaganda, and popular feeling is so strong against Germans and German sympathizers that it affects even their trade. The defeat of the Ship Purchase Bill reflects this strong public sentiment, and the Administration clearly understands that, should it favour the Germans, it will run counter to the current of popular feeling."

We are glad to note that the feeling of the people of the United States as a whole continues to be (and this feeling we venture to think will increase) very friendly to England and the Allies. It certainly ought to be, as we are fighting her battles without any assistance. It may be doubted, however, whether the present administration sufficiently represents this feeling. It may be that the President's message to the Emperor of Germany on the occasion of his birthday was a customary courtesy, but it did not sound well at this time to say: "In behalf of the Government and people of the United States, I have the pleasure to extend to your Majesty cordial felicitations on this anniversary of your birth, as well as my own good wishes for your welfare." A more intelligent sense of neutrality would seem to have required at this time the omission of this birthday message; but it must be remembered that Mr. Wilson has an eye to votes in the near future, and thinks this may secure him some.

MILITARY SERVICE.

In his speech in the House of Lords last week, Lord Haldane made quite clear the obligations of the citizen towards military service. By the common law it is the duty of every subject of the realm to assist the Sovereign in repelling the invasion of its shores and in defence of the realm. Again, compulsory service is in no way foreign to our Constitution, and this is conclusively proved by our past history. Few will deny the superiority of voluntary over compulsory service, but the Lord Chancellor left no doubt that the Government, should it become necessary, would fall back on compulsion, although with reluctance.—*Law Times*.

NEUTRALITY.

The beautiful and brilliant daughter of Thomas Sheridan, one of the most gifted of British writers, says "Neutrality is hate." It certainly is not friendship as we have recently learned to know. Mrs. Norton's lines are as follows:—

"Neutrality is Hate: the aid withheld
 Flings its large balance in the adverse scale,
 And makes the enemy we might have quelled
 Strong to attack and possibly prevail;
 Yea, clothes him, scoffing, in a suit of mail!
 Upright we stand, and trust in God—
 And in ourselves."

LAWYERS AS SOLDIERS OF THE KING.

The legal profession, through Mr. Gerard B. Strathy, Barrister, has been honoured by his munificent and patriotic gift to the Army Medical Corps (No. 2 Casualty Clearing Station) of a Wolseley Automobile Ambulance fully equipped to be delivered in London. And not only this, but Mr. Strathy goes to the front himself as Quartermaster of the Unit. The gift has been accepted by the authorities and Mr. Strathy thanked by Lt.-Col. Rennie and Major-General Hughes for so useful and practical a gift.

We of the profession may learn some lessons in these days, when we think we are doing so much, from Lord Cockburn's "Memorials of His Own Time." The spirit that imbued the legal fraternity in the old land, a hundred and odd years ago, might well be emulated by some of us in this country. Speaking of the Napoleonic wars Lord Cockburn says:—

"After the war broke out again in 1803, Edinburgh, like every other place, became a camp, and continued so till the peace in

1814. We were all soldiers, one way or other. Professors wheeled in the College area; the side arms and the uniform peeped from behind the gown at the bar, and even on the bench; and the parade and the review formed the staple of men's talk and thoughts. Hope, who had kept his Lieutenant-Colonelcy when he was Lord Advocate, adhered to it, and did all its duties after he became Lord Justice Clerk. This was thought unconstitutional by some; but the spirit of the day applauded it. Brougham served the same gun in a company of artillery with Playfair. Others (naming them) were all in one company of riflemen. Francis Horner walked about the streets with a musket, being a private in the Gentlemen Regiment. Dr. Gregory was a soldier, and Thomas Brown the moralist, Jeffrey, and many another since famous in more intellectual warfare. I, a gallant captain, commanded ninety-two of my fellow creatures from 1804 to 1814—the whole course of that war. Eighty private soldiers, two officers, four sergeants, four corporals, and a trumpeter, all trembled (or at least were bound to tremble) when I spoke. Mine was the left flank company of the Western Battalion of Midlothian Volunteers. John A. Murray's company was the right flank one; and we always drilled together. When we first begun, being resolved that we townsmen should outshine the rustics, we actually drilled our two companies almost every night during the four winter months of 1804 and 1805, by torch light, in the ground flat of the George Street Assembly Rooms, which was then all one earthen-floored apartment. This was over and above our day proceedings in Heriot's Green and Bruntsfield Links, or with the collected regiment. The parades, the reviews, the four or six yearly inspections at Dalmahoy, the billettings for a fortnight or three weeks when on permanent duty at Leith or Haddington, the mock battles, the marches, the messes—what scenes they were! And similar scenes were familiar in every town and in every shire in the kingdom. The terror of the ballot for the regular militia which made those it hit soldiers during the war, filled the ranks; while duty, necessity, and especially the contagion of the times, supplied officers. The result was that we became a military population. Any able-bodied man, of whatever rank, who was not a volunteer, or a local militiaman, had to explain or apologise for his singularity."

We commend this last sentence to the special attention of any student or any young barrister whom the cap would fit. We would again remind them that Canada is at war with Germany. A German invasion would not be an unmixed evil.

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No. 4

MARRIAGE AND DIVORCE IN CANADA.*

PART I.

1. INTRODUCTION.
2. JURISDICTION, DOMINION AND PROVINCIAL.
3. DOMINION LEGISLATION.
4. SOURCES OF THE PROVINCIAL LAWS.
 - (1) *British Columbia.*
 - (2) *North West Territories, Alberta, Saskatchewan and Manitoba.*
 - (3) *Ontario.*
 - (4) *Quebec.*
 - (5) *The Maritime Provinces.*

PART II.

1. CAPACITY FOR MARRIAGE.
2. CIRCUMSTANCES RENDERING THE MARRIAGE VOID.
 - (1) *The legal age of marriage.*
 - (2) *Insanity.*
 - (3) *Existing previous marriage.*
3. CIRCUMSTANCES RENDERING THE MARRIAGE VOIDABLE.
 - (1) *Impotence.*
 - (2) *Consent—Error, fraud, or duress.*
 - (3) *Relationship within prohibited degrees.*
 - (4) *Spiritual or official positions.*
 - (5) *Difference of religion.*
 - (6) *Marriage of minors—Consent of parents.*
 - (7) *Communicable diseases or feeble-mindedness.*

* The scope of this article, prepared by Fraser Raney, M.A., LL.B., Barrister, with an introduction by W. E. Raney, K.C., appears by the following summary. Part I. appeared in the last issue; parts II and III are given in this number, and the remainder will appear in next issue.

PART III.

1. THE MARRIAGE CEREMONY.

- (1) *The three main classes of marriage ceremonies.*
- (2) *Who may solemnise marriage.*
- (3) *Authorisation of marriage—Banns or license.*
- (4) *Time, place and witnesses.*

2. REGISTRATION OF MARRIAGES.

PART IV.

1. DIVORCE TRIBUNALS AND THE GROUNDS UPON WHICH DIVORCE IS GRANTED.

2. DIVORCE BY ACT OF PARLIAMENT.

3. DIVORCE BY PROVINCIAL COURTS.

4. PROCEDURE.

5. FOREIGN MARRIAGES.

6. DISSOLUTION OF MARRIAGE.

- (1) *By Canadian Divorce Courts.*
- (2) *By Courts of a foreign country.*

PART V.

1. RIGHTS AND OBLIGATIONS OF PARENTS AND CHILDREN.

- (1) *General statement.*
- (2) *Adoption.*
- (3) *Children of divorcees.*
- (4) *Children born out of wedlock.*

PART II.

1. CAPACITY FOR MARRIAGE.

The following definition expresses in popular form the idea that marriage is more than a contract; it is, as Story says, an institution. It is both a contract and a status resulting from a contract.

"Marriage is a bond between husband and wife which is based on nature and sanctioned by law, and which has as its object that they shall live together for life in the closest community to the exclusion of all other men and women."⁴¹

41. Renton & Phillmore, "Comparative Laws of Marriage and Divorce," London (1910), at p. 1.

The qualifications required by the law to enable a man and woman to enter into the contract of marriage may be classified as positive and negative.⁴² The former are the essential requirements without which no marriage can exist; if these are not complied with the marriage is *ipso facto* void. The latter are restrictions, the breach of which does not render the marriage void, but (a) may render it voidable or (b) may subject the offending parties to penalties.

A void marriage is good for no legal purpose. Its validity may be attacked by any one at any time and the invalidity subsists without the judgment of any Court. Such, for instance, would be a marriage where either party had contracted a previous and still existing marriage, or where either party is under fourteen or an idiot. A voidable marriage, on the other hand, is one in the constitution of which an imperfection exists which can only be inquired into during the lifetime of the parties in proceedings by one of them to have it declared void. If such a marriage is not attacked by one of the parties whilst the other is still alive, it is as good as any other, and it cannot be attacked collaterally either during the lifetime of the parties or afterwards. Circumstances which would give ground for such proceedings in the provinces having Courts with jurisdiction to entertain them are impotency, error, fraud, duress, or the want of the consent of parents.

2. CIRCUMSTANCES RENDERING THE MARRIAGE VOID.

(1) *The legal age of marriage.*—According to the civil law a valid marriage could not be contracted by a man under the age of fourteen or by a woman under the age of twelve years unless to prevent illegitimacy. This provision was adopted by the English common law and remains the law of all the provinces of Canada except Ontario, where the age is fourteen for both men and women,⁴³ and Manitoba, where it is sixteen.⁴⁴

42. *Ib.* at p. 76.

43. R.S.O. (1914) ch. 148, sec. 16.

44. Statutes of Manitoba (1906), 5 & 6 Edw. VII. ch. 41, sec. 16.

(2) *Insanity* is a bar to marriage on the ground that without reason there can be no consent. Mere weakness of understanding is not enough. It is necessary that the insanity should have existed at the time of the alleged marriage. A valid marriage may be entered into in a lucid interval, provided the individual has not previously been found a lunatic by commission.

Drunkenness at the time of the marriage may or may not be a ground for nullity, depending upon the circumstances of each case.

(3) *Existing previous marriage*.—If there is an existing valid marriage on the part of either of the spouses, the subsequent marriage is bigamous and void and the offending party is liable to the penalty provided by the Criminal Code.

3. CIRCUMSTANCES RENDERING THE MARRIAGE VOIDABLE.

(1) *Impotence*.—At common law capacity for consummating marriage is implied in the marriage contract, and its absence renders a marriage voidable. A suit for nullity on this ground, however, must be brought within a reasonable time and during the lifetime of the parties. Neither party may set up his or her impotency for the purpose of dissolving the marriage.⁴⁵

In the Province of Quebec such an action must be brought within three years of the marriage.⁴⁶

(2) *Consent, error, fraud or duress*.—According to the common law the will or free consent of the parties is the very essence of the contract. If, therefore, a marriage is entered into when the parties or one of them is acting in error or is subject to fraud or duress, the marriage may be set aside by this party.

Error may be as to person, condition, fortune or quality according to the common law. If a party is tricked into marrying the wrong person, this is a ground for having the marriage set aside. The other three kinds of error—as to condition, *i.e.*, whether slave or free; as to fortune—whether rich or poor; and as to quality, whether a virgin or not, or of noble birth or not—are now of no avail.

45. *Norton v. Seton* (1819) 3 Phillimore's Reports, p. 147.

46. Civil Code of Quebec, Art. 117.

Fraud is a good ground for having a marriage set aside, especially if the person defrauded is an infant. In the case of adults the fraud perpetrated must be in respect of the essentials and not mere accidentals of the marriage. If the fraud is the fraud of third parties relief will not be granted.

Duress or force may be either corporeal or mental. In either case a marriage brought about by these means may be set aside. The amount of coercion required to be proved varies with the strength of the person affected. Fear of harm happening to the party coerced or to some third person must be established.

The provisions of the Civil Code of Quebec are the same as the common law in this respect, but after six months' cohabitation, and after having acquired full liberty or become aware of the error, the person coerced or in error, as the case may be, cannot have the marriage annulled.⁴⁷

(3) *Relationship within the prohibited degrees.*—Consanguinity is the relationship of parties who are descended from the same ancestor, and is either in the direct or collateral line. In the direct line of ancestors and descendants, marriage is absolutely unlawful, however remote the relationship may be. In the collateral lines all beyond the third degree according to the civil law computation may contract valid marriages. Thus, first cousins may intermarry. Affinity is the relationship which arises from marriage, and is an impediment to the same extent as consanguinity, with the exception that Dominion legislation has permitted marriage between a man and his deceased wife's sister or niece.

In England since Lord Lyndhurst's Act (1835) all marriages between persons within the prohibited degrees of consanguinity and affinity are "absolutely null and void to all intents and purposes whatsoever."⁴⁸ But Lord Lyndhurst's Act has been held not to be applicable in Canada, and Canadian marriages within the prohibited degrees are therefore merely voidable as such marriages were in England before 1835, not "absolutely null and void."

47. Civil Code of Quebec, Arts. 148 & 149

48. Imp. Stat., 5 & 6 Wm. IV. ch. 54.

It will be noted that whilst by virtue of the Dominion legislation above referred to a man may lawfully marry his deceased wife's sister or his deceased wife's niece, he may not marry his brother's or his nephew's widow, and a woman may not marry her deceased husband's brother or his nephew or her deceased sister's husband. It is also to be noted that this prohibition extends to the half-blood, and includes illegitimate relationships. The table of prohibited degrees as set out in the appendix to the Ontario Act is in force in all the provinces.⁴⁹

(4) *Spiritual or official positions*.—The Quebec Civil Code provides that the "impediments recognized according to the different religious persuasions as resulting from relationship, affinity or from other causes, remain subject to the rules hitherto followed in the different churches and religious communities."⁵⁰

It has been held by the Quebec Courts that under this provision the Roman Catholic Church has power over its own members to annul the marriage of a person who has taken solemn vows as a monk or nun or is in holy orders.

"According to the jurisprudence of the country, the sentence of the Roman Catholic Bishop, regularly pronounced and deciding as to the validity or nullity of the spiritual and religious tie of

49. R.S.O. (1914) ch. 148

A man may not marry his
Grandmother,
Grandfather's wife,
Wife's grandmother,
Aunt,
Uncle's wife,
Wife's aunt,
Mother,
Stepmother,
Wife's mother,
Daughter,

Wife's daughter,
Son's wife,
Sister,
Granddaughter,
Grandson's wife,
Wife's granddaughter,
Niece,
Nephew's wife,
or his
Brother's wife.

A woman may not marry her
Grandfather,
Grandmother's husband,
Husband's grandfather
Uncle,
Husband's uncle,
Father,
Stepfather,
Husband's father,
Son,
Husband's son,

Daughter's husband,
Brother,
Grandson,
Granddaughter's husband,
Husband's grandson,
Nephew,
Niece's husband,
Husband's nephew,
or her
Husband's brother.

50. Civil Code of Quebec, Art. 127.

marriage between Roman Catholics, can and ought to be recognized by the Superior Court."⁵¹

In view, however, of the opinions of the majority of the Judges of the Supreme Court of Canada in answer to the questions submitted to the Court as to the authority of the Parliament of Canada to enact the proposed Marriage Act of 1912,⁵² it seems probable that this pronouncement of the Quebec Court is not good law and would not be approved by the Supreme Court of Canada.

(5) *Difference of religion.*—While difference of religion of the contracting parties is not an impediment to a lawful marriage in any part of Canada, the Roman Catholic Church in Quebec has recently made a determined effort to establish its authority to declare invalid a marriage between two Roman Catholics or between a Roman Catholic and a Protestant, unless performed by a Roman Catholic priest. The Papal decree known as *Ne Temere*, which came into force on Easter Sunday, 1908, promulgated this doctrine. A majority of the Judges of the Supreme Court of Canada are, however, of the opinion that this decree is only binding on the consciences of members of the Roman Catholic Church, and cannot be given effect to by the Civil Courts of Quebec.⁵³

(6) *Marriage of minors of legal age—Consent of parents.*—But in one respect Ontario has gone further than any of the other provinces. In 1907 the Provincial Legislature passed an Act⁵⁴ providing that where a form of marriage has been gone through between persons one of whom is under the age of eighteen, without the consent of the parent or guardian, the Supreme Court of the Province shall have jurisdiction in an action brought by the party who was under the stipulated age, to declare the marriage invalid, provided the parties have not lived together as man and wife and provided that the action is brought before the plaintiff attains

51. *Laramée v. Evans* (1880) 24 Lower Canada Jurist, p. 235; *Trewberg v. Terrill* (1900) 6 R. de J., p. 143.

52. See *In re Marriage Laws*, 46 S.C.R., p. 132.

53. *Ib.*

54. Now R.S.O. (1914) ch. 148, secs. 36 and 37.

the age of nineteen. The constitutionality of this Act has been doubted by high authority.⁵⁵ The other provinces have contented themselves with enacting legislation intended to discourage such marriages, without, however, affecting their status once the contract has been entered into. These acts contain provisions intended to insure publicity and that the parties are of competent age to marry without parental consent or that such consent has been given, and are all modelled after the English Act of 1834.⁵⁶ Quebec, Nova Scotia, British Columbia, the North West Territories, Alberta and Saskatchewan require parental consent, if the parties are under twenty-one, with the exception that in the North West Territories and Alberta and Saskatchewan where a female over eighteen and under twenty-one is living apart from her parents and earning her own living, their consent is not necessary. Manitoba and New Brunswick fix the age of emancipation in this respect at eighteen for both sexes. In Quebec a marriage contracted without the required consent can only be attacked by those whose consent was required, and then only within six months after the marriage.⁵⁷

It is to be noted that it is only in respect of clandestine marriages, that is to say, the marriage of a person under the age of eighteen without consent of his or her parents, that Ontario has asserted its jurisdiction. Theoretically a marriage may be avoided in any province of Canada on the other grounds above indicated, but in Ontario these other grounds are practically a dead letter for want of a forum competent to make the declaration. Moreover, the jurisdiction of the Ontario Legislature to establish such a forum is doubtful.⁵⁸

(7) *Communicable disease or feeble-mindedness*.—The fact that one of the contracting parties may have a communicable and incurable disease, the presence of which is not known to the other, is no legal ground for attacking the marriage and will not subject the party to any penalty at law. Nor is it a legal objection that

55. *May v. May* (1910) 22 O.L.R., p. 559.

56. Imp. Stat., 4 Geo. IV. ch. 76.

57. Civil Code of Quebec, Arts. 150 & 151.

58. *May v. May* (1910) 22 O.L.R., p. 559.

one or both of the parties are mentally defective, provided only that the deficiency falls short of what the Courts would recognize as insanity or idiocy, in which latter case the marriage would be void *ipso facto*.

PART III.

1. THE MARRIAGE CEREMONY.

(1) *The three main classes of marriage ceremonies.*—(a) The purely civil ceremony, characteristic of France and Germany, and permitted in Great Britain, the United States, and Western Canada. (b) The purely religious, characteristic of Russia and other countries under the sway of the Greek Church. (c) The mixed civil and religious ceremony, characteristic of Great Britain, Canada, and many other parts of the British Empire.

By the canon law, the intervention of a priest was not essential to the validity of a marriage.⁵⁹ It has been held, however, though not without much dissent, that the English common law requires the presence of a priest.⁶⁰ Whether or not, on account of our different local conditions, this requirement of the common law is applicable to Canada, was for some time a subject of debate. It was finally held that, in the absence of legislative provision, this rule is to be followed, except where the country is so barbarous that a proper ceremony is impossible.⁶¹

In Ontario marriages irregularly celebrated are valid at the end of three years from the date of the ceremony, or on the death of either party within that period, if they have cohabited as man and wife. This is subject to the proviso that there was no legal disqualification to marry, and that neither party was lawfully married within the three years to anyone else.⁶² Manitoba and other Provinces have similar provisions.

Prince Edward Island, British Columbia, the North-West

59. *Renton v. Phillmore*, *supra*, at p. 177.

60. *The Queen v. Millis* (1844) 10 C. & F., p. 534.

61. *Connolly v. Woolwich* (1867) 11 Lower Canada Jurist, p. 197.

62. R.S.O. (1914) ch. 148, sec. 35.

Territories and the Provinces of Alberta and Saskatchewan⁶³ have made provision for the performance of the marriage by civil officials in no way connected with any religious body or organization.

With some minor exceptions, the provincial laws as to the solemnization of marriage are much alike. The latest Ontario statute⁶⁴ may be taken as typical.

(2) *Who may solemnize marriage.*—In Ontario the following persons, being men and resident in Canada, may solemnize marriage: (a) Ministers and clergymen of every church duly ordained or appointed; (b) elders chosen by the Disciples of Christ Church for that purpose; (c) any duly-appointed Commissioner or Staff Officer of the Salvation Army commissioned to solemnize marriage; (d) elders or other officers of the Farringdon Independent Church chosen for that purpose, whose appointment has been previously filed in the office of the Provincial Secretary. Marriages according to the usages of the Quakers are also valid.

In Nova Scotia there is a provision requiring a provincial certificate as well as authorization by the congregation in the case of Salvation Army officers. Prince Edward Island requires such a certificate if the applicant for the privilege of performing the ceremony is not a regularly ordained clergyman. New Brunswick requires that all clergymen performing the ceremony be registered. Alberta also requires every religious denomination to send a list of persons authorized to perform marriages to the Vital Statistics Department every six months.⁶⁵ British Columbia requires a clergyman to have resided within the Province for one month before performing the ceremony.

British Columbia, the North-West Territories, Alberta and Saskatchewan, as already stated, allow civil marriages; British Columbia by registrars appointed under the Provincial Marriage

63. See Stat. Prince Edward Island, 6 Vict. ch. 8 (Sched.); 2 Wm. IV. ch. 16, secs. 4-6; Consolidated Ordinances of the North West Territories (1898) ch. 46; Rev. Stat. Saskatchewan (1909) ch. 132. Marriage Ordinance in force in the North West Territories (ch. 46 *supra*) is also in force in Alberta.

64. R.S.O. (1914) ch. 148.

65. Statutes of Alberta (1908) ch. 20, sec. 23, sub-sec. 4.

Act, and the North-West Territories, Alberta and Saskatchewan by Marriage Commissioners appointed by the Lieutenant-Governor in Council. In Prince Edward Island there is no direct authority given to justices of the peace to perform the marriage ceremony, but the statute appears to contemplate that marriage may be lawfully celebrated by license before a justice of the peace according to the form of the Common Prayer Book.⁶⁶

In Quebec, priests, rectors, ministers, and other officers authorized by law to keep registers of acts of civil status, are qualified to perform the marriage ceremony.⁶⁷ As already stated, this is subject to the right of any religious denomination to impose penalties (not enforceable by the civil law) upon members of its communion who are married otherwise than by a priest or minister of their own church.

(3) *Authorization of marriage—Banns or license.*—The necessity of giving notice of the marriage, either by publication of banns or by obtaining a certificate or license after making the required affidavit, is common to the laws of all the Provinces. The differences are as to details only. The Ontario Act may again be taken as typical.

This Act provides that no minister or other authorized person shall solemnize any marriage, unless duly authorized so to do by license or certificate under the Act, unless the intention of the parties to intermarry has been published as required by the Act. Such publication must be by announcement once before or after the Sunday service from the pulpit in the pastoral charge where one of the parties has resided for at least fifteen days immediately preceding the publication. The marriage must take place not sooner than one week or later than three months from the publication. Licenses and certificates are issued by persons appointed by the Lieutenant-Governor. No irregularity in the issue of a license or certificate, where it has been obtained or acted on in good faith, will invalidate a marriage solemnized in pursuance thereof.

66. See Stat. Prince Edward Island, 6 Vict. ch. 8 (Sched.); 2 Wm. IV. ch. 16, secs. 4-6.

67. Civil Code of Quebec, Art. 129.

An affidavit setting forth where the marriage is to be performed, that there is no legal bar to the marriage (such, for example, as consanguinity within the prohibited degrees), as to residence in the city, county or district for fifteen days or proper publication of notice in lieu of residence, as to the age and condition of life of the parties, and as to the consent of parents (where necessary) must be sworn before the license to marry will be issued.⁶⁸

Nova Scotia and the North-West Territories require publication of the banns on two consecutive Sundays, British Columbia on three. Manitoba has a provision dispensing with publication of the banns at the request of the head of a church, and this dispensation operates as a marriage license. In Quebec banns must be published three times unless a dispensation has been obtained.⁶⁹ Notice is published by the Registrar or Marriage Commissioner in British Columbia, the North-West Territories, Alberta and Saskatchewan, in lieu of banns where a civil marriage is to be performed.

(4) *Time, place, and witnesses.*—The provisions as to these requirements are all intended to conduce to publicity.

In Ontario a marriage must be performed between 6 o'clock in the morning and 10 o'clock at night, unless the clergyman officiating is satisfied that exceptional circumstances exist. The marriage need not take place in a consecrated church or chapel. Two adult witnesses must be present and must affix their names as witnesses to the record in the register.

Similar rules are in force in the other Provinces. British Columbia requires that civil marriages take place between 10 o'clock in the forenoon and 4 o'clock in the afternoon, and that all marriages must be "with open doors." Nova Scotia makes no provision at all as to time and place. In Quebec a marriage must be performed at the domicile of one or other of the parties, or the clergyman officiating is bound to verify and ascertain the identity of the parties.⁷⁰ Two witnesses are also necessary in Quebec.

68. R.S.O. (1914) ch. 148, sec. 19.

69. Civil Code of Quebec, Art. 57-59.

70. Civil Code of Quebec, Art. 63.

2. REGISTRATION OF MARRIAGES.

In Ontario a clergyman is required to enter in a register kept by him, immediately after the marriage, full particulars as to the name, age, occupation, religion, etc., of the persons married. Every issuer of marriage licenses is also required to endorse the same particulars upon a form supplied for that purpose, and to send the same to the Registrar General.

The laws of the Provinces differ but slightly as to provisions for registration. Nova Scotia requires that the return of particulars be made within ten days to the issuer of the license; Prince Edward Island, within six months, to the Island Surrogate; New Brunswick, at once, to the registrar of the division; Manitoba, to the municipal clerk; North-West Territories and Saskatchewan, within one month to the registrar of the division, and Alberta within one month to the registrar whose post-office is nearest.

(To be Continued.)

CANADIAN BAR ASSOCIATION.

The first annual meeting of this Association was held at Montreal, on the 19th and 20th days of last month. The attendance was large and representative, and the addresses were of a high order of merit. Sir James Aikins, K.C., President of the Association, and who has been re-elected to that position for the coming year, presided, and made an admirable chairman.

Even the legal profession does not yet realize the importance of this Association, and, of course, the average citizen cannot be expected to. The more one thinks about it, the more one is impressed with the far-reaching and beneficial effects that, if it is wisely guided and true to its mission, may flow from the deliberations of this Association, which gathers together the most representative and enterprising members of our profession from all parts of this wide Dominion.

The fact that such a good beginning has been made in the face of great difficulties (not the least of which is the geographical one) augurs well for its success and usefulness in the future. It

marks a great step forward in the history of the Dominion, so far as the welfare of the profession and the due administration of justice is concerned; and those who have worked so hard for it in its initial stages deserve both praise and encouragement.

Great care was taken in the selection of the Committees, and it is believed that practical developments of the objects of the Association will be shewn as the result of their work. It was decided to hold the next annual meeting in the city of Toronto, in June, 1916.

As soon as the report of the proceedings, which were of a very interesting character, is complete, further details will be given to our readers, together with as many of the addresses as can be found room for within the limits of our space.

Referring now to the various addresses, that of the President was illuminative as to what has been done and as to the proposed scope and work of the Association in the future, and was inspiring and full of hope and promise. The Minister of Justice, who was present, with other notables, gave an eloquent address. The address of the Hon. Arthur Meighen, K.C., bespoke the mind of a clear thinker, and shewed the Solicitor-General for Canada to be also an eloquent and cultured speaker. We listened with pleasure and satisfaction to what was said by Mr. E. F. B. Johnston, K.C., in his paper on "The Honour of the Profession." It was a well-considered effort, and clothed in forcible and appropriate language. It was once said by someone who had a responsibility as to the selection of Judges that the first requirement was that he should be a gentleman, in the proper sense of that term, and if he knew a little law, so much the better. We concur with him and with what Mr. Johnston said in that connection. The ethics of the profession is a subject which cannot be too strongly insisted upon, if we are to retain the confidence and goodwill of the public. It goes without saying that the address of Mr. Lafleur, on the "Uniformity of the Law," which is the subject most appropriate to the consideration of this Association, was in accordance with the high reputation of that learned counsel.

Our guests from the United States were Hon. James M. Beck and Mr. Estabrook, of New York. They were listened

to with the greatest interest and loudly applauded. The address of the latter, in which he eulogized the stand taken by England in connection with the present war and the duty laid upon neutral nations, especially referring to his own country, was an eloquent tribute to the mother of the Anglo-Saxon nations; the best of her sons could not have more happily expressed the loyalty and affection due to her.

It is gratifying to be able to record that this the first annual meeting of the Canadian Bar Association was a distinct and marked success.

THE CARRIE DAVIES TRIAL.

The trial and the verdict of acquittal in the case of Carrie Davies, charged with the murder of her employer, Charles A. Massey, reflect no credit upon the administration of criminal justice in the Province of Ontario.

The main facts of the case as regards the killing of Mr. Massey were simple, and may be shortly stated as follows: The wife of the deceased was away from the city for a week's holiday. Their son, aged fourteen, was living in the house, as was also the prisoner, being there as a domestic servant. The killing took place on a Monday evening. A newsboy came to the door about 6 o'clock and asked for money for the paper. The prisoner said that Mr. Massey was not in. The boy replied, "he is coming up the road," whereupon the prisoner looked out and presumably saw him. She immediately went upstairs and loaded a revolver belonging to the son of the house, and when the deceased came to the door she fired at him without result, but firing again the shot took effect and he fell dead on the sidewalk. The deceased had left the house in the morning after breakfast, and did not return until the time when he met his death.

The prisoner in her evidence stated that on the day previous he had kissed her twice and had also made improper suggestions to her and threw her on the bed, when she struggled and ran away. There was no evidence to corroborate this; and it may be said generally that the whole defence rested upon the girl's evidence

alone. This defence was that she committed the act in self-defence; in other words, that it was a case of justifiable homicide. Counsel for the prisoner made no allegation that the prisoner was temporarily insane, nor was the defence based on the theory of a "brain-storm," such as was the claim in the well-known Thaw case. It was a plain and straight excuse that the prisoner was, under the circumstances, justified in doing what she did.

The evidence was of a very meagre character, and there was apparently no attempt to throw light upon several points which would seem to be of interest, if not of importance. Possibly it might be claimed that the nature of the defence made an exhaustive inquiry of the attendant circumstances unnecessary. But the interests of justice seem to have required all possible light to be thrown upon this tragic event; and it must be remembered that it was these attendant circumstances which were said so to have operated on the girl's mind as to induce her to think that her only chance of safety from the alleged blandishments of her master was his death. And here it may be noted that the mind of the jury was undoubtedly largely swayed by such circumstances as were brought to their attention.

It was naturally asked why the girl remained in the house all day if she was afraid of ill-treatment when the deceased should return in the evening. The answer that the girl had promised her mistress to stay there until she returned appears to us to be entirely inadequate, in view of the girl's alleged fears, which bulked so large in her mind as to require the death of a man to quiet them. But however this may be, the alleged justification was utterly inconsistent with the rules of law as laid down in England and in this country as to "justifiable homicide," and we make this statement more strongly as we have as yet heard of no lawyer who is of a different opinion.

As we have said, the case was a very simple one, and the only question for the jury (and this should have been insisted upon by the learned Judge) was whether or not the prisoner believed or had reason to believe that she was in danger of immediate violence threatening her life or chastity, and any provocation must have been both "recent and reasonable." Nor was it an act done in

the "heat of passion or anger suddenly aroused at the time by some immediate and unreasonable provocation." Another judicial statement is that "homicide in self-defence is not justifiable unless there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer, and unless, also, there is reasonable ground to apprehend that the danger is imminent." It is clear from the admitted facts that the act committed was neither excusable nor justifiable in law, and the only possible verdict was either murder or manslaughter. The case of *The King v. Lesbini* (see *post* p. 145) is directly in point and confirms the view that the verdict was contrary to the law and the evidence.

In the unusually full report which appeared in some of the daily papers the learned Judge is stated as having said, when the verdict was recorded: "A verdict in which I concur. The jury perhaps have taken a view of the case not absolutely in conformity with strict rules, but they have rendered substantial justice."

A number of circumstances which had nothing to do with the alleged crime—such as the fact that her father was a soldier, that her fiancé was at the front, that she desired to save her honour at all costs, etc.—may have affected the minds of those engaged in the trial. Nevertheless, it must appeal to thinking men, apart from any question of sentiment, that this trial and verdict create a very dangerous precedent, and tend to encourage a lawlessness and disregard of the sacredness of life which hitherto has happily not been rife in this country.

It has been suggested that the circumstances surrounding the case and the absence of available evidence as to other circumstances indicated that those engaged in the trial, and others who did not appear, were not averse to a result which was merciful and which cast a veil of oblivion over the miserable tragedy. We, however, have no views as to this, though it is not surprising that attention has been called to there being so little brought out in evidence as to a variety of circumstances barely touched upon, and certainly not probed. "The least said, the soonest mended," is an aphorism which has much wisdom in it, but is scarcely

applicable to a murder trial, when the blood of a dead man "cries from the ground" at least for a searching inquiry.

The Court and jury and others have in effect said, "she served him right," or less tersely, "his death was her only protection," but unfortunately the dead man can say nothing. And, in addition, others may be led to follow her pernicious example.

A more unsatisfactory criminal trial from a legal point of view could not well be conceived. The majesty of the law cannot safely be trifled with, if a country is to retain its law-abiding character, and there is a feeling that in this case it has not been as carefully guarded as we are always led to expect it would be in the administration of criminal law in England and Canada. Perhaps the awful slaughter of men, women and children that we are now hearing of day by day is making us careless of the sacredness of human life.

KEEPING FIREARMS IN HOUSES.

Two recent events forcibly brought to the attention of the public the danger arising from the presence of firearms being kept in houses. A girl of 18 was tried for the alleged murder of a well-known citizen of Toronto. The revolver used was one belonging to someone in the house and apparently easily obtainable. The other was a case of a young girl, who was playing in her own yard. Being annoyed by the jeering of a small boy on the top of the fence and who refused to leave her alone, she ran into the house and got a loaded rifle and put a bullet into his thigh. Whilst one cannot help feeling that the boy deserved what he got, it shews the danger of loaded weapons being permitted where irresponsible people can get them. There is a law forbidding the carrying of concealed weapons, but evidently something more is necessary to prevent such occurrences as have recently and are frequently taking place. *Law Notes* thus refers to the subject:—

We already have statutes forbidding the carrying of concealed weapons. These statutes, it hardly need be said, have not proved effectual to accomplish the end sought. Nor, it is believed, will there ever be an approximation to that end except through a

complete ban upon the use of the pistol for other than police purposes. The proposal has a certain timeliness in view of the recent operations of the gunmen that have been exploited in the public prints. It would have little claim to serious consideration, however, if the reason for it were to be found only in these episodic incidents, flagrant though they be. The daily recurring homicides, suicides, and tragic accidents, of which the pistol is the convenient instrument, speak more trumpet-tongued against the longer sufferance of that diabolic piece of mechanism in a civilized society. What beneficent social purpose does the pistol serve that atones for the havoc wrought by it? It is a false notion of security that keeps it in the home. The housebreaker does not fear it, but its presence there does multiply the number of domestic tragedies. Unfortunately there has been thrown about the pistol a certain glamour that has blinded us to its real and essential ugliness. It is romantically exploited in the theatre, where a certain amount of gun-play is thought to be necessary to stirring and effective melodrama. Similarly the fiction writer has found the revolver an unfailing resource in the construction of his thrilling climaxes. In these and other ways we have been made so familiar with the pistol that we have become indifferent to its deadly significance, and, to a degree, our sense of the sacredness of life has been blunted. The pistol spells death, and it is high time that we realized that fact and placed an effectual ban upon its distribution and use. We are continually devising new methods to restrict the distribution of poisons and narcotic drugs, but we permit the barter and sale of the more deadly revolver to go on unrestrained. In all shapes, sizes and patterns these death-dealing devices gleam temptingly in the showcases of the gunsmith, and every pawnbroker's window is filled with them. They tempt to crime; they make crime easy. As a police measure, therefore, the prohibitive hand of the law may well be placed upon them. We confess that we do not like the word prohibition. But pistol laws now on the statute books are flagrantly inadequate, and a drastic prohibitive law such as has been suggested seems to be the only thing that will meet the situation.

PEACE THEORIES.

The humorous side of the present stupendous conflict appears occasionally in the papers of the American Society for Judicial Settlement of International Disputes. We have had occasion to notice some of their productions, theoretically unobjectionable and often praiseworthy in their intention, but, of course, ludicrously futile. Recently a paper was published by an Oxford professor under the title "Does International Law still Exist?" The writer comes to the conclusion that it does, and he anticipates that at the end of the war it will stand on a more secure footing than before. The hope is also expressed "that the world will declare that the clear principles of law must never again be set aside as of no account." This is a very pleasing hope, but one that we do not anticipate will ever be realized. The question in this paper leads one's thoughts to the last paper of the Society above referred to. We are glad that it shews that even some people of the peace-at-any-price party have lucid intervals, and are beginning to see the humorous side of their work, for the last paper makes a statement which must have cost him many pangs, *viz.*, "An International Force must support an International Tribunal." In other words, there is no use in establishing a code of criminal law without providing a sufficient police force to enforce its observance and punish offenders. Whilst this can be done in individual nations, the present war indicates that it can never be hoped for in the community of nations; and therefore the discussion of this self-evident proposition is a waste of time, and had better be postponed until the world has nothing else to do but theorize.

THE UNITED STATES OF EUROPE.

The mind of the American Association for International Conciliation is developing under the stress of a war which the Peace Party thought should have been prevented by arbitration. Their last paper has a new remedy for the war fever, and it is "The Federation of Nations." It is said to be a necessary step in the

evolution of mankind. The paper admits the weakness of the modern peace movement, and suggests a federation of the nations of Europe, after the plan of the organization of the United States and the German States, and avers that "this condition is destined to come." Another paper by the President of Columbia University, reprinted in the *New York Times*, is headed "The United States of Europe." In it the belief is expressed "that the organization of such a federation will be the outcome, soon or late, of a situation built up, through years of European failure to adjust government to the growth of civilization," and that thinking men of the contending nations are beginning to consider such a contingency.

We quite agree that such a federation as the United States of Europe will shortly be an existing fact; but that it will have the effect anticipated by these "thinking men" we deny. Our reason for thinking that such a federation is imminent is that an old Book, not cited by these writers, but looked upon as an authority by very many, stated thousands of years ago that such a federation would take place. We will even go further than these learned professors and prophesy that this federation will consist of ten kingdoms, and that the ruling spirit or the president of these United States of Europe will be a genius such as the world has not yet seen; much greater than Napoleon or Wilhem II., each of whom, in his mad ambition, thought he might become some sort of Universal Dictator. We commend the study of this old Book to the writers above referred to. They will find much of interest in it, and it will give them much food for thought and enable them to forecast events with greater accuracy and certainty.

ALIEN ENEMIES AS LITIGANTS.

Five important judgments on this subject have recently been given in the English Court of Appeal, the names of the cases being *Porter v. Freudenburg*, *Kreglinger v. Samuel and Rosenfeld*, *Re Merten's Patent*, *Continental Tyre and Rubber Company v. Daimler Company*, and *Continental Tyre and Rubber Company v. Thomas Tilling Limited*. The first three cases raised questions as to the capacity of alien enemies to sue in our Courts during the con-

tinuance of the war, their liability to be sued, their right to appeal to the appellate courts, and their rights generally to appear and be heard. The two latter cases discussed the position of limited companies registered in England where the majority of the shareholders are alien enemies pure and simple.

A writer in the *English Law Journal* thus speaks of the judgment in the three cases first referred to:—

The established law, as laid down by Lord Stowell in the great case of *The Hoop* (1799), being that one of the consequences of war is the absolute interdiction of all commercial intercourse with the inhabitants of the hostile country, everything else follows as a result. The rule provides and carries with it its own limitations. So the Court had no difficulty in deciding that, though "alien enemies" have generally no civil rights, and cannot take proceedings in our Courts, yet persons who are subjects of enemy States, but are resident here by tacit permission of the Crown, are entitled to sue, for they are *sub protectione domini regis*. As to the liability to be sued, it was sufficient to say that to decree immunity during hostilities would be to convert that which is a disability imposed upon the alien enemy because of his hostile character into a relief to him from the discharge of his liabilities to British subjects. It followed as a necessary consequence, in the view of the Court, that an alien enemy sued can appear and be heard in his defence and take all such steps as are necessary for the proper presentation of his defence. "To deny him that right," said the Lord Chief Justice, "would be to deny him justice, and would be quite contrary to the basic principles guiding the King's Courts." Applying the same principles to the question of appeals, the Court distinguished between cases where the "alien enemy" is suing or defending. In the first case, where he is the appellant, he is the "actor" throughout, he cannot invoke the assistance of the Courts; in the second, though he initiates the appeal, he is in fact on his defence, and is entitled to have his case decided according to law, none the less that there is a judgment against him in a Court of first instance.

The same writer, in speaking of the position of alien companies, says:—

Adopting the principle which is applied to individuals that "enemy character" is the criterion of suing capacity—not enemy origin or nationality—it is hard to see why there should have been any difference of opinion about the right of a duly constituted English company, trading and having its registered office in this country, merely because some or all of its constituent members were aliens. It is scarcely consistent with the unanimous judgment of the full Court to hold that a company domiciled here may not maintain an action, because of its constituents, though each of those constituents, if so domiciled, would have a right to sue notwithstanding his alien, but not "alien enemy" character. Five out of the six Judges who heard the appeals in the *Continental Tyre Company's* cases declined to draw the suggested distinction between natural and legal persons, and it is odd that the single dissident was just the most technically-minded of them all. Lord Justice Buckley, regarding the important question at issue as one of relative friendliness or enmity, and holding as essential the capacity to pay allegiance to the King, "which could not be predicated of a mere legal entity," refused to recognize the company's rights because of its alien constituents. The view of the learned Lord Justice that such a company should not be allowed to recover the debts due to it (though no funds collected could be transmitted abroad) was obviously based on considerations of public policy, for he maintained that even if his judgment were wrong, as it presumably was, the matter was one which called for urgent legislation. "Public policy," it has been said, "is an unruly horse and dangerous to ride—when once you get astride it you never know where it will carry you"; and one of the more careful of the Judges, commenting on this text, roundly declared that "Judges are more to be trusted as interpreters of the law than as expounders of what is called public policy." The majority of the Court were mindful of this dictum, observing that nothing could more easily tend to create uncertainty and confusion in the law than to allow considerations of public policy, as distinguished from law based upon public policy—a very acute and just distinction—to be a ground of judicial decision.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

EMPLOYER AND WORKMAN—NOTICE OF INJURY—OMISSION TO GIVE NOTICE—WORKMEN'S COMPENSATION ACT (4 GEO. V. c. 25), s. 20.

Potter v. Welch (1914) 3 K.B. 1020. In this case the point discussed is whether or not the omission to give notice of the accident for which compensation was sought was excusable. On January 7, 1913, the workman met with the accident by a door falling on his head causing him to bite his tongue. He immediately gave verbal notice of the accident to the foreman, and the accident was also reported to one of the employers at the time. On January 11 he was attended by his own doctor, who found him suffering from an open discharging wound in the tongue. The difficulty of taking food increased, but he continued to work until July 14. On July 22 he died of cancer of the tongue resulting from the injury. No written notice of the accident had been given. The Court of Appeal (Cozens-Hardy, M.R., and Eady and Pickford, L.JJ.), reversing Channel, J., held that no reasonable cause within the meaning of the Act of 1906 had been shewn for not giving the notice. From the opinions expressed by the Court of Appeal it would seem that the only two grounds on which notice can be excused are (1) that the injury was latent or (2) that it was of so trivial a character that it would be unreasonable to expect the workman to give notice of it.

We may also observe that in this case it was also decided by Channel, J., with the concurrence of the Court of Appeal, that where a deceased workman could not himself recover at common law by reason of contributory negligence, no action would lie by his representatives under the Fatal Accidents Act.

CRIMINAL LAW—FALSE PRETENCES—EVIDENCE.

The King v. Sagar (1914) 3 K.B. 1112. This was a prosecution for obtaining goods on false pretences, the false pretence alleged being a pretence that the accused was carrying on a genuine and *bonâ fide* business as a manufacturer's agent and merchant. The accused offered evidence of receipts for payments of goods supplied to him by different firms, and his bank pass-books shewing payments for goods, which Ridley, J., refused to receive. The Court of Criminal Appeal (Lord Reading, C.J., and Coleridge and Avory, JJ.) held that it should have been received, and the conviction was quashed on that ground.

CRIMINAL LAW—MURDER—PROVOCATION NECESSARY TO CONSTITUTE MANSLAUGHTER—ACCUSED SANE BUT HOT TEMPERED AND SENSITIVE, WITH DEFECTIVE SELF CONTROL AND WANT OF MENTAL BALANCE.

The King v. Lesbini (1914) 3 K.B. 1116. In this case the prisoner was convicted of murder in the following circumstances. He went into a shooting gallery in charge of a girl, who made a jesting remark to him which he resented. She then invited him to take some shots, to which he agreed, and she then said, "It just shews what sort of temper he has, it is soon over," and she opened a case and took out a revolver which she loaded for the prisoner and laid it on the counter for him. The prisoner took it up and pointed it at the target, but turning round he went in front of the girl and said, "Now I've got you," and levelled it at her. She screamed out, "Oh, please don't, don't!" and ran away. The prisoner followed and discharged the revolver at her, inflicting a wound from which she died. It appeared that the prisoner had little self control and was wanting in mental balance. The prisoner was convicted of murder, and the question raised before the Court of Criminal Appeal (Lord Reading, C.J., and Avory and Lush, JJ.) was whether the evidence disclosed a sufficient case of provocation as to reduce the crime to manslaughter. The Court agreed with the judgment of Darling, J., in *Rex v. Alexander*, 9 Cr. App. R. 139, and with the principles enunciated in *Regina v. Welsh*, 11 Cox 338, where it is said "there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man and so as to lead the jury to ascribe the act to the influence of that passion." The Court rejected the view that it ought to take into account the different degrees of mental ability of the prisoners who come before it, and if one man's mental ability is less than another's to find that the provocation may be sufficient in his case which would not be sufficient if he were a reasonable man. The conviction was therefore affirmed.

MARINE INSURANCE—CONCEALMENT OF MATERIAL FACT—INNOCENT MISTAKE AS TO MATERIALITY—"HELD COVERED" CLAUSE IN POLICY.

Hewitt v. Wilson (1914) 3 K.B. 1131. This was an action on a policy of marine insurance, which contained the clause: "In the event of deviation being made from the voyage hereby insured, or of any incorrect definition of the interest insured, it is agreed to hold the assured covered at a premium (if any) to be arranged."

The goods insured were printing machinery, and during the voyage some of it was broken. The assured had omitted to state that the machinery was second-hand, and there was evidence to shew that the difficulty and cost of replacing lost or injured parts of second-hand machines was greater than in the case of new ones. Bailhache, J., who tried the action, held that the fact that the goods were second-hand was material, and ought to have been disclosed; but he held that the case was within the above-mentioned provision, because, as he found, the concealment was not due to any intention to deceive, but merely to a misapprehension on the plaintiff's part as to its materiality.

MANDAMUS (PREROGATIVE)—REGISTRAR OF COMPANIES—REGISTRATION OF COMPANY—OBJECTION TO NAME, "UNITED DENTAL SERVICE"—COMPANY PROPOSING TO CARRY ON DENTISTRY BY UNREGISTERED PERSONS.

The King v. Registrar of Companies (1914) 3 K.B. 1161. This was an application for a prerogative mandamus to the registrar of companies to compel him to register a company styled "The United Dental Service Limited." One of the objects of the company was "to carry on the practice, profession or business of practitioners in dentistry in all its branches," and it was intended to do this by practitioners not registered under the Dentists Act, 1878. The registrar refused registration (1) because he considered that the use of the name for the purpose of carrying on business by unregistered practitioners was a violation of the Dentists Act, and (2) because it was a name calculated to deceive the public into believing that the business was carried on by registered practitioners. The Divisional Court (Lord Reading, C.J., and Bankes and Avory, JJ.), in view of the decision of the House of Lords in *Bellerby v. Heyworth* (1910) A.C. 377 (noted *ante* vol. 46, p. 619), and the case of *Minter v. Snow*, 74 J.P. 264, held that the first ground was untenable, and as regards the second they held that the discretion of the registrar did not extend to enable him to reject registration on that ground, as he had no power to hold a judicial inquiry on that point. The mandamus was therefore granted.

PARTNERSHIP—TRADING FIRM—IMPLIED AUTHORITY OF PARTNER OF TRADING FIRM TO BORROW MONEY.

Higgins v. Beauchamp (1914) 3 K.B. 1192. This was an action to recover money borrowed by one member of a firm on the ground that he had an implied authority to bind the other

partners. The business of the firm in question was that of a cinematograph theatre. The articles of partnership expressly provided that no partner should borrow money for the firm without the consent of the other partners. In violation of this article, one of the partners borrowed money from the plaintiff, and for which the plaintiff sought to make the other partners liable, on the ground of the borrower having an implied authority to contract the loan. The borrowed money was misappropriated by the borrower. The County Court Judge who tried the case gave judgment for the plaintiff, but the Divisional Court (Horridge and Lush, JJ.) held that the implied authority only existed for the purpose of trading businesses, and that a cinematograph theatre was not a trading concern. The judgment was therefore reversed.

ILLEGITIMATE CHILD—MAINTENANCE—PROOF OF PARENTAGE—
CORROBORATIVE EVIDENCE—PREVIOUS CONVICTION OF PUTA-
TIVE FATHER—(R.S.O. c. 154, s. 2 (2)).

Mash v. Darley (1914) 3 K.B. 1226. This was an appeal from the decision of the Divisional Court (1914) 1 K.B. 1 (noted *ante* vol. 50, p. 115), affirming an order for the maintenance of an illegitimate child, in which the Court of Appeal (Buckley, Kennedy and Phillimore, L.JJ.), though affirming the decision, do so on different grounds from those taken by the Divisional Court. The proof of the prior conviction of the defendant for carnally knowing the applicant, by oral testimony, their Lordships hold was insufficient proof of the conviction; but the oral testimony of what took place before the magistrates and at the trial of the defendant they hold was nevertheless admissible as, and was corroborative evidence, within the meaning of the Act (see R.S.O. c. 154, s. 2) of the applicant's evidence as to the paternity of the child.

ILLEGITIMATE CHILD—CHILD BORN ABROAD—AFFILIATION ORDER
—(R.S.O. c. 154).

The King v. Humphrys (1914) 1237. This was a motion for a certiorari to bring up an order of justices adjudging the applicant to be the father of an illegitimate child. It was contended that the child having been born abroad, though now with its mother domiciled in England, was not properly the subject of such proceedings. The Divisional Court (Bankes and Lush, JJ., Avory, J., dissenting) overruled the objection.

**COSTS—JOINT DEFENDANTS IN ACTION OF LIBEL—DEFENDANTS
SEVERING IN PLEADING—JUDGMENT AGAINST BOTH DEFEND-
ANTS WITH COSTS—LIABILITY OF ONE DEFENDANT FOR COSTS
OCCASIONED BY CO-DEFENDANT.**

Hobson v. Leng (1914) 3 K.B. 1245. This was a libel action against two defendants, one of whom admitted his liability and pleaded an apology, and the other pleaded justification. At the trial judgment was given against both defendants with costs, and the judgment was so entered. The Judge at the trial refused to give any special direction as to the costs. On the taxation the defendant who pleaded apology objected to being charged with the costs occasioned by his co-defendant's plea of justification. The taxing officer disallowed the objection. Rowlatt, J., on appeal, allowed it, and the Court of Appeal (Buckley, Kennedy, and Phillimore, L.JJ.) affirmed Rowlatt, J.'s decision. It appears from this case that in England there is a difference of practice on this point in the King's Bench and Chancery Division. In the latter division the taxing officer taxes according to the judgment, and exercises no discretion as to the apportionment of costs, unless expressly directed so to do, whereas in the King's Bench Division under a judgment for costs in general terms the taxing officer applies Ord. lxv., r. 1, and apportions costs having regard to the issues in the action.

**DISCOVERY — PRODUCTION OF DOCUMENTS — PRIVILEGE FROM
PRODUCTION—DOCUMENTS COMING INTO EXISTENCE IN CON-
TEMPLATION OF LITIGATION—DOCUMENTS OBTAINED FOR
OBTAINING ADVICE FROM SOLICITOR.**

Adam Steamship Co. v. London Assurance Corporation (1914) 3 K.B. 1256. This was an action on a policy of marine insurance for a constructive total loss. The defendants on the happening of the loss instructed the Salvage Association to look after their interests. The defendants claimed that the communications by cable and otherwise which passed between them and the Salvage Association after notice of abandonment as a total loss and before action were privileged as having been procured for obtaining their solicitors' advice and to enable the solicitors properly to conduct the case. The Court of Appeal (Buckley, Kennedy, and Phillimore, L.JJ.), overruling Bailhache, J., held that the documents were privileged as claimed.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Man.] HALPARIN v. BULLING. [Dec. 29, 1914.

*Negligence—Master and servant—Use of motor car—Disobedience—
Act in course of employment—Employer's liability.*

B. was owner of an automobile and hired a chauffeur to run it, giving him positive instructions that the car was not to be used except for purposes of the owner and his family, and that, when not in use for such purposes, it was to be kept in a certain garage. On the evening of the accident in question, the chauffeur took his master's family to a theatre, in Winnipeg, and was directed by them to take the car to the garage and return for them after the close of the performance. The chauffeur took the car from the garage before the appointed time, and proceeded with it for the purpose of visiting a friend in a distant part of the city. While so using the car, contrary to instructions, he negligently ran down the plaintiff, causing injuries for which an action was brought to recover damages against B.

Held, affirming the judgment appealed from (24 Man. R. 235) that, at the time of the accident, the chauffeur was not engaged in the performance of any act appertaining to the course of his employment as the servant of the owner of the car, and, consequently, his master was not liable in damages. *Storey v. Ashton*, L.R. 4 Q.B. 476, followed.

Appeal dismissed with costs.

Nesbitt, K.C., and *H. Phillips*, for the appellant.

W. N. Tilley, for the respondent.

Que.] PRINGLE v. ANDERSON. [Dec. 29, 1914.

*Construction of will—Legacy to church committee—Special fund—
Ultior disposition of bounty—Failure in object of bequest—
Lapse of legacy—Art. 964 C.C.*

At a time when the congregation of St. Matthews Presbyterian Church, in Montreal, was heavily encumbered with debt

incurred in building the church, a committee was formed to collect contributions to be applied in liquidating the debt by means of a "building fund," and the testatrix made her will by which she bequeathed certain real property to that committee. The committee were relieved of their duty and the fund ceased to exist several years later, and during the year previous to the death of the testatrix the original debt in respect of which the building fund had been established was fully paid. There remained, however, at the time of her death, balances of debt still due for expenses incurred for other building purposes. In an action to have the bequest declared to have lapsed on account of failure in its ulterior disposition:—

. *Held*, affirming the judgment appealed from (Q.R. 46, S.C. 97), Duff and Anglin, JJ., dissenting, that, in the circumstances of the case, the bequest must be construed as a bounty to the trustees of the church for the purposes of building expenses, including debts incurred for such purposes subsequent to the construction of the church; that the motive of the testatrix was not to make a contribution to any particular fund, but to benefit the congregation in respect to its building liabilities generally, and that the legacy did not lapse in consequence of the "building fund" having ceased to exist and the extinction of the debt in regard to which contributions to that fund were to be applied.

Per Duff and Anglin, JJ., dissenting:—It was of the essence of the gift that it should be capable, at the time of the death of the testatrix, of being applied in furtherance of the specific purpose for which the "building fund" had been instituted, and, in consequence of the failure of that ulterior disposition, it lapsed, under the provisions of art. 964 of the Civil Code.

Appeal dismissed with costs.

C. M. Holt, K.C., and *W. F. Chipman*, for the appellant.

J. E. Martin, K.C., for the respondents.

Alberta.]

ROWLAND v. CITY OF EDMONTON.

[Feb. 2.

Highway—Old trails of Rupert's Land—Survey—Width of highway—Construction of statute—60 & 61 Vict. ch. 28, sec. 19—North-west Territories Act, sec. 108—Transfer of highway—Plans—Registration—Dedication—Estoppel—Expenditure of public funds.

The plaintiff's lands, held under Crown grant of 1887, were bounded on the south by the middle line of Rat Creek (now in the

city of Edmonton), and were traversed by one of the "old trails" of Rupert's Land, known as the "Edmonton and Fort Saskatchewan Trail." Upon instructions, under sec. 108 of the North-west Territories Act, as enacted by 60 & 61 Vict. ch. 28, sec. 19, that portion of the trail was surveyed and laid out on the ground by a Dominion land surveyor, shewing its southern boundary approximately as Rat Creek, and thus giving it a width upon the plaintiff's lands in excess of the sixty-six feet limited by this section. The plan of this survey was not shewn to have been approved by the Surveyor-General, nor was it filed in the Land Titles office as required by the statutes in force at the time.

Held, reversing the judgment appealed from (28 West. L.R. 920), that the statute gave the surveyor no power to increase the width of the highway authorized to be laid out by him; that the approval of the Surveyor-General and the filing of the plan in the Land Titles office were necessary conditions to the transfer of the trail as a public highway, and, consequently, the land comprised in the augmentation of the highway remained vested in the plaintiff.

Plaintiff sold part of his lands, described as bounded by the northerly limit of the surveyed trail, and, subsequently, the purchasers, and other persons holding other lands south of Rat Creek, filed plans of subdivision shewing the surveyed trail as of the full width given by the surveyor. The city also claimed to have expended moneys in improving the roadway at the locality in question.

Held, that the registration of the plans of subdivision, made without privity on the part of the plaintiff, was not binding upon him, and that there was not such evidence of expenditure of public money or conduct by the plaintiff—by recognizing the plans as filed—as could preclude him from claiming the lands encroached upon or compensation therefor.

Appeal allowed with costs.

Ewart, K.C., and *G. B. O'Connor*, for appellant.

Bown, K.C., and *O. M. Biggar*, K.C., for respondents.

Correspondence

MARRIAGE—PROHIBITED DEGREES IN CANADA.

To the Editor CANADA LAW JOURNAL:

SIR:—Permit me to point out that Mr. Raney, K.C., is mistaken when he says (p. 85 *supra*) that it was under 28 Hen. VIII. ch. 7 that Henry VIII. was divorced from Queen Catherine. A brief reference to dates will shew this. The so-called divorce (it was really a declaration of nullity of marriage) was pronounced 23rd May, 1533. The statute 27 Hen. VIII. ch. 7 was passed in the year 1536. It is clear that Henry could not have been "divorced" under a statute which was not passed until three years after the so-called "divorce" had taken place.

A perusal of 32 Hen. VIII. ch. 38 will shew to any unprejudiced mind that Henry's Parliament had the most excellent reasons for its legislation concerning prohibited degrees, altogether apart from any wish to favour the King's amatory desires. They took the subject out of the hands of ecclesiastics, who had dealt with it, as Mr. Raney states, in order to raise money, and they gave a legal sanction only to the prohibitions stated explicitly or implicitly in the Bible, which were what they called "God's law." For it must always be remembered that the prohibitions set forth in 28 Hen. VIII. ch. 7 are not of the Parliament's own devising, but merely those set forth in the Bible (Lev., c. 18), which in those days was generally considered by Christian people, and by most Christian people is still considered, to be "God's law" on the subject. This is really on what our prohibited degrees in Canada are based, and not the "matrimonial vagaries" of Henry VIII., as Mr. Raney states.

GEO. S. HOLMESTED.

[It seemed best to hand the above letter to Mr. Raney to answer. The discussion is especially interesting as the two learned gentlemen engaged in it are specially versed in the subject. Mr. Raney's answer is as follows:—

"Mr. Holmested is quite right in saying that the dissolution of the marriage tie between Henry and Catherine was really by a declaration of nullity. But a declaration of nullity is, both by the dictionaries and colloquially, also a divorce, and the historians, Green, for instance, sometimes speak of the decree of separation of Henry and Catherine as a declaration of nullity, but more often as a divorce.

I have to thank Mr. Holmested for calling attention to the error in citation. The statute which I intended to cite was the

"Act Concerning Succession," 25 Hen. VIII. ch. 22 (1533). This Act declared and adjudged the marriage of Henry to Catherine to have been "against the laws of Almighty God," and to be "utterly void and anihiled." But Mr. Holmested is in error in attributing validity, as he apparently does, to the decree pronounced by Archbishop Cranmer on the 23rd of May, 1533. Archbishop Cranmer had no jurisdiction to deal with the case except the authority conferred upon him in virtue of his office by the Bishop of Rome, and, on appeal by Catherine from the judgment of Cranmer, the Pope reversed the judgment of the Archbishop, and declared the marriage of Henry and Catherine to have been perfectly legal according to the ecclesiastical law. Obviously, then, the Cranmer divorce cannot be invoked. But Parliament had undoubted jurisdiction and undoubtedly exercised it in the Act of 1533, which, in point of time, was subsequent to the Archbishop's decree, and,—and this is the point I was endeavouring to make,—it was by this same statute that the prohibited degrees of marriage were first established as a part of the statute law of England.

Then, as to the relation of the prohibited degrees to "God's law," which, I take it, is the real point of Mr. Holmested's letter,—I did not, of course, overlook the 18th chapter of Leviticus. But when doctors, both of the supremest authority, differ, who am I that I should attempt to decide between them? It is said that Leviticus says that the prohibited degrees are "God's law." At all events the Parliament of Henry said so. But the Parliament of Edw. VII., the example being followed by the Parliament of Canada, unquestionably said something quite otherwise when it made it lawful for a man to marry his deceased wife's sister, and I felt myself obsessed with the difficulty which confronted the court in *The King v. Dibdin* (1910), p. 57, where one of the learned Judges was led to remark that:—

It is to my mind so repulsive as to be inconceivable that the King, by and with the advice of the Lords Spiritual and Temporal and the Commons, should have continued the declaration that such marriages are contrary to God's law as incestuous, and yet should have legalized them as regards the clergy and laity alike, and authorized their solemnization in church to the desecration of the house of God.

With all Henry's bestiality, he had a profound respect for the forms of the law, and it is, I think, a safe argument that, but for the desire to give colour of respectability and legal sanction to his infatuation for Anne Boleyn, Leviticus 18 would not have been incorporated by his Parliament into an English statute."

Ed. C. L. J.

Book Reviews.

Commentaries on the Law of Master and Servant. Including the modern laws on Workmen's Compensation, Arbitration, Employer's Liability, etc. By C. B. LABATT, B.A. (Cantab), M.A., Toronto, of the Bar of San Francisco. In eight volumes. The Lawyers' Co-Operative Publishing Co. 1913. 2nd edition. Agents for Canada, Carswell Co., Toronto.

The title, "Commentaries on the Law of Master and Servant," scarcely indicates the extent and immensity of the author's production, for these volumes contain an exhaustive treatise on the law of master and servant, including workmen's compensation, employer's liability, interference with service, labour unions, use of union labels, strikes, boycotts, arbitration, statutes, the constitutionality of statutes, and every other variety of subject incidental to the relation of master and servant which has come up for adjudication or would be likely to arise. One can therefore readily understand that eight large volumes were required to deal with such a collection of subjects.

The entire mass of information in connection with the relation ship of master and servant and its ramifications has been so conveniently and clearly arranged, tabulated and indexed that one seeking information finds available what might not unreasonably be described as an exhaustive code of law on each and every branch. The work also deals exhaustively with the history, principles, doctrines and judicial and statutory authorities from which it has been deduced, together with the rights and remedies incidental thereto.

The text is based on the decisions of the Courts of Great Britain, United States, Canada, Australia and New Zealand, and indeed of all countries where the law of England is the basis of jurisprudence. The differences in the law of these various jurisprudences are ably contrasted, so that the work is equally useful wherever the law of England prevails, even though varied by custom or practice according to locality.

Such is the comprehensiveness and thoroughness of this great law book that none other on the subject of master and servant need be consulted; and its utility is apparent over any work which contains the law as decided in one country only, as the seeker for information has had collected for him cases which have been decided on the great variety of questions that would necessarily arise throughout the large extent of territory over which the range and authority of English law extends. And

in this connection it may be stated that all the decisions of the Courts of the United States are cited. This, of course, is peculiarly useful to us, as the customs of these two countries are so similar.

In the text is given the result of the decisions; the doctrines deducible therefrom are explained, and the reasons for the decisions made plain. To all this the author adds his own valuable comments and criticisms, elucidating the principles, and thus enabling a practitioner to rapidly and easily ascertain the law and apply it to any new facts or to any undecided question. The footnotes are admirable in matter and in method. In them you find not only a complete digest of the law on the subject, but references to leading cases, with quotations from the judgments of such leading cases as are the foundation of the laws.

It would, of course, be impossible to refer at any length to those portions of this work which might be cited as characteristic of the author's style, his lucidity of expression, logical reasoning and grasp of legal propositions. We can only refer our readers to such passages as the following:—

Sections 102 to 105, discussing English and American doctrines as to the validity of contracts made by infants.

Sections 156-163, as to English and American doctrines relating to the duration of a contract without specific mention of time.

Section 158, a criticism of the Ontario doctrine on this subject.

Section 1394-1398, a general discussion of the doctrine of common employment.

Section 2475, notes 4, 6, 7, criticizing some Canadian cases.

Section 2514-2517, relating to torts of persons employed by subordinate servants to assist them.

The whole of Vol. 6, especially the part relating to the liability of a master for the torts of his servant.

One can safely say that everything required in connection with the law of master and servant is in these eight volumes. There is, in addition, a very good and full index. An analysis of the subjects within the scope of each chapter is given in the beginning of each chapter, which is divided into paragraphs in logical arrangement. Each paragraph is headed with black type, indexing its contents. In fact, everything has been done to aid the reader in readily finding what he may be seeking. Even pages of a darker colour are inserted in certain places to shew where indices and tables of cases may be found.

A study of the work demonstrates that all the law on the subject has been collected and discussed, and that every artifice of arrangement, analysis and index has been added to enable the

various phases of the subject to be readily found; thus evidencing the time, industry, research and experience required to produce this monumental work, which must be regarded as the leading authority upon the subject.

This treatise is largely cited and most highly spoken of in the United States Courts. One Judge says, in a letter to the author, "I have frequent occasion to use and be helped by your really great book on Master and Servant." He further says, in referring to a case before his Court, "you will find in this case partial acknowledgment of the great value of your work to one who is not wrapped up in case law." And a learned Judge of an Appellate Court says, "Personally I regard it as the best text book that the present generation has produced."

We notice that several American periodicals make most complimentary references to this treatise. In the *Harvard Law Review* we find the following remarks: "Almost everywhere the discussion is enlightened and enlightening. This would be no surprise to readers of the preliminary edition: the two stout volumes which appeared in 1904, and which may be found in a revised form in the 4th and 5th volume of the present still larger work. The most interesting part of the present edition is probably the 6th volume. It is here that the careful and original, though not improperly original, analysis which is an attractive feature of the greater part of the work is found at its best."

Another writer, in speaking of modern law books and encyclopædias, considers that the profession constantly require a higher standard of excellence in text books, and states his belief that the author of this work has "correctly interpreted the requirements of the profession."

We conclude by concurring with another writer that "the Bench and Bar are indebted to Mr. Labatt and to the Lawyers' Co-operative Publishing Company for giving the profession such a valuable contribution to the legal literature of the period."

A. McLEAN MACDONELL.

Bench and Bar.

LAW SOCIETY OF ALBERTA.

The Fourth General Meeting of this Society was held at Edmonton, on January 4 and 5, 1915.

Reports were presented from the committees which had charge of the following matters:—

Proposed amendments to the Legal Profession Act: On tariff

of costs, to the effect that the changes recommended had been incorporated in the new rules of practise in force since Sept. 1, 1914: Education and legal committee of the Benchers. The Dominion Bar Association, etc.

Various matters of general interest to the profession were then taken up and discussed. A resolution was passed urging upon the Attorney-General to have the statute law of the Province revised and that a competent committee be appointed for such purpose. The committee named was O. M. Biggar, K.C., C. F. Newell, K.C., and E. H. MacKinnon.

Resolutions were passed to make more convenient registration and searches as to chattel mortgages; and to make further provisions for procedure in the Land Titles Offices.

A special committee was appointed to enquire into and report on the present territorial jurisdiction in the District Courts and to make suggestions in reference thereto. The codification of the law as to vendor and purchaser was discussed and a special committee was appointed to consider and report upon the matter.

The following members of the Society were nominated to represent the Alberta Law Association on the Council of the Canadian Bar Association: C. F. P. Conybeare, K.C., A. H. Clarke, K.C., O. M. Biggar, K.C., and R. B. Bennett, K.C.

Interesting addresses were delivered by A. H. Clarke, K.C., M.P., on "Aliens and Naturalisation" and by Sir James Aikins, K.C., M.P., on "Some Purposes of the Canadian Bar Association and the Noblesse Oblige of the Legal Profession."

The Judges of the Supreme and District Courts, Visiting Guests and Benchers and other members of the profession were entertained at a banquet by the Edmonton Bar Association.

Mr. C. C. McCaul, K.C., was elected Chairman and Mr. Charles F. Adams, Secretary.

COUNTY OF YORK LAW ASSOCIATION.

The twenty-ninth annual meeting of the County of York Law Association was held at the City Hall on the twenty-fifth day of January, 1915.

After the annual report of the Trustees of the Association was read and adopted, Mr. A. MacMurchy, K.C., presented the report of the Special Committee on the New Registry Office, Mr. George C. Campbell read the report of the Special Committee on Consolidation of Registry Systems, and Mr. R. J. MacLennan read the report of the Committee on Legislation. These reports were discussed and adopted

The Association testified their appreciation for the interest and efficiency shewn by Miss Read, the Librarian, during the past year.

The Librarian's report shewed that the Library now contains 6,338 volumes, of which 168 were added during the year 1914. A resolution was passed deprecating the practice of handing out information concerning wills by Surrogate Court clerks to non-interested parties.

The Special Committees on the New Registry Office, on Consolidation of Registry Systems, and on Legislation, appointed last year, were continued.

The election of officers for the year 1915 resulted as follows:—

President, M. H. Ludwig, K.C.; *Vice-President*, Angus MacMurchy, K.C.; *Treasurer*, George C. Campbell; *Secretary*, W. J. McCallum; *Curator*, J. D. Falconbridge; *Historian*, Beverley Jones; *Trustees*, D. T. Symons, K.C., Shirley Denison, K.C., H. W. Mickle, G. L. Smith, E. J. Hearn, K.C., J. E. Day, D. Urquhart, Edward Bayly, K.C., and R. J. Maclellan.

War Notes.

Speaking of our neighbour's neutrality it is said that a German war vessel entered a port of the United States with a lot of passengers, some of whom were taken from an American ship which had been piratically sunk by this warship. A statute of the United States provides that what was thus done was an act of piracy punishable by death. So far, it would seem that the United States Government is content to accept an apology from the German Government and payment of damages. One also constantly heard a few years ago the slogan, "Remember the Maine." Why so much fuss over the blowing up of that vessel, which was never proved to have been the act of a Spaniard, and no fuss at all over the admitted crime of a German?

The press has probably been unnecessarily harsh in its criticisms of Lord Haldane in connection with his supposed pro-German proclivities. This may partly have arisen from his speech at a dinner of diplomats shortly before the war, in which he lauded the Kaiser as "a man and a great man gifted by the gods with the highest gift they could give," and other laudatory remarks; also because he is a lover of German literature and admires the devotion of the Germans to learning and science. The *Spectator* comes to his rescue in a recent number, and protests

against the charge that he has been wanting in patriotism. The writer says: "In our opinion these attacks are most unfair. We have plenty of criticisms to make on the want of preparation for which the Government is responsible, and we must, when the proper time comes, press them home. It is, however, unjust to single out Lord Haldane for attack." The same writer says that the great difficulty, and one which the whole Government was responsible for and not Lord Haldane alone, was that there was not kept in store a million rifles beyond those required for visible needs. It is also to be remembered that Lord Haldane on the whole immensely increased the efficiency of the British Army in connection with his creation of the territorial force.

It has been suggested that the proper way to deal with German barbarism, piracy and murder, is for the Government to announce at once that they will hold the individuals who have authorized these crimes personally responsible for all clearly ascertained breaches of the rules of civilized warfare; and that they will, when conditions of peace are imposed, make it a primary condition that all such persons, not excluding the Emperor himself, shall be handed over to pay the just penalty of their crimes, and be dealt with as ordinary criminals.

Flotsam and Jetsam.

Apropos of the recent appointment of the Acting Chief Justice of a certain province of Canada, whose decisions have not always been received by the Bar with the favour they ought, a story is told that, on one occasion, counsel in the Court of Appeal said: "This is an appeal from the judgment of the Hon. Mr. Justice ———, but there are *other* reasons why the judgment should be reversed."

An item in a daily newspaper says, "Philadelphia lawyers and Judges are to decide whether coffee is a food or a beverage." This reminds us of the orderly officer, making his daily rounds, inquiring if there were "any complaints," and receiving from a newly-joined recruit the reply, "Yis sorr, plaze sorr, they chates me out of the thick of the coffee, sorr." It is clear that the question had been decided in Ireland long before it came before Philadelphia lawyers.

Someone is always taking the joy out of life. When, now, under the influence of the seductive tango, one-step, and hesitation, many of our grey-beards are undergoing a process of rejuvenation, along comes a court decision that puts an age limit upon dancing. At thirty-five, say two learned Judges of the Court of Special Sessions, at Jamaica, L.I., a man should cease to dance. This empirical pronouncement was made on the hearing of a charge against a man of thirty-five, lodged by his wife, that he neglected her at home, while he sought the delights of the dance halls. The chief justice of the court, however, who is over thirty-five, disagrees with his associates, handing down a dissenting opinion to the effect that a man should cease to dance only when his joints lose their flexibility, and when dancing fails to add to the pleasure of his life and to the gayety of nations. This is sound doctrine, and will be gratefully received by the white-haired devotees of the terpsichorean art. That age should not, of itself, exclude one from the dancing floor is a proposition that finds strong support in ancient as well as modern times. Socrates, for example, learned to dance when he was past sixty. And no facetious reference is here intended to the merry dance that the shrewish Xanthippe was wont to lead him. A modern instance shewing that age does not always wither is the case of the aged couple at South Norwalk, Conn., who in celebrating their golden wedding participated enthusiastically in dancing the fox trot. *Verbum sap.* Judges should hesitate before laying down a rule of limitation in this matter that is bound to be upset in the court of public opinion.—*Law Notes.*

A London solicitor, who has joined the 1st Sportsman's Battalion, Royal Fusiliers, has received the following congratulatory telegram from an old client:—

"Accept my congratulations on your gallantry in joining the Sportsman's Battalion. Anyway, you know how to *charge*."

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CANADIAN BAR ASSOCIATION.

In our last issue we referred to the importance of this Association and the far-reaching benefits to the profession and to the public which might well be hoped for from its deliberation and from the widespread influence for good which should result from the work of such an organization, if loyally supported by the Bar and energetically and wisely managed by those to whom this work has been entrusted.

The three addresses and the record of proceedings of the recent annual meeting which are given to our readers in this number will enable them to form their own opinion as to the mission and proceedings of the Association; and we venture to think they will agree with us that this literature gives evidence of present vitality and the promise of future growth.

The addresses we refer to were delivered by Sir James Aikins, K.C., President of the Association, dealing with "The Advancement of the Science of Jurisprudence in Canada"—by Mr. E. F. B. Johnston, K.C., on "The Honour of the Profession" and by Mr. Eugene Lafleur, K.C., on "The Uniformity of Laws in Canada."

THE ADVANCEMENT OF THE SCIENCE OF JURISPRUDENCE IN CANADA.

BY SIR JAMES AIKINS, K.C., PRESIDENT OF THE ASSOCIATION.

The purposes of this Association are professional, they relate only to our profession and its advancement, to the law and its administration and improvement. They are Canadian and apply equally to all races and languages and creeds, with which they do not interfere, nor will they conflict with any ex-

isting provincial law societies or organizations—on the contrary, the Canadian Association seeks the co-operation of these. Its design is usefulness.

Faithful and efficient service has been and is a characteristic of our profession; it is due to the client, expected by the people and willingly given by the Bar. The highest title and dignity conferred on a member of the English Bar before 1880 was that of serjeant, who is the "serviens" of Bracton's time—the "serving man" of about the Thirteenth Century. For this purpose of service members of our profession are required to be learned in the law and the principles of Government, to be of moral character and industrious, usually to take an oath of office promising to uphold the constitution of the land, to aid in the administration of its law. Their conduct after being called is always under scrutiny by fellow practitioners who are zealous for the honour of the Bar. For any dereliction in duty they are liable to discipline by the society to which they belong and by the court before which they practise. They are thus certified to the people as those having general knowledge of affairs and learning beyond the ordinary, as capable of giving advice on the written and unwritten law which governs the people and their business, as worthy to be trusted counsellors of persons in any occupation or in positions of authority. To the credit of our profession be it said that most who have entered it have recognized the obligations and responsibilities thus assumed and have generally performed them.

Few indeed have spent energy and time and money in the preparation for admission to the legal profession and have entered it with the primary object of thereby making money. Those who have done so have shewn at the outset lack of judgment and good taste, both essentials to true professional success. It is not a calling or instrumentality suited to that purpose as is the business of the merchant, manufacturer or miner. Persons who have thus sought to commercialize it, to prostitute it to such an end in itself have lowered the professional tone and so lost the respect and esteem of their fellow-practitioners and

of the people. They take no interest in the advancement of our profession and do not possess its spirit. At all times ready to make use of anything to promote their own selfish interests, they merit the remark of Lord Bacon:—

“They cared not what became of the ship of estates if so be that they could save themselves in the cock-boat of their fortunes.”

The lawyer's sphere cannot be as clearly defined as that of the doctor of medicine or the minister. His range is wider “*hic et ubique*,” his duties multifarious, his training more versatile. Moreover, the constant practise in caring for his clients, in assuming their burden and the direction of their many affairs, added to the training of his student life, naturally increases in the lawyer that habit of service and usefulness for others. The frequency with which he examines both sides of the various questions submitted to him tends to impartiality and a judicial and temperate habit of mind. Further, the vigorous participation in affairs with the purpose to do right amid the many lures and temptations incident to his vocation is the most wholesome moral tonic which nature can have. Such employment does not certainly cultivate the scruples of the casuist or the glowing visions of the seer but it does stimulate and strengthen for the robust work of the world and the accomplishment of noble purposes which end in things well done and not in dreams. Time was when the lawyer was regarded as aloof from the practical affairs of the world, as the learned and dignified aristocrat of society who did not concern himself with the daily duties of common life or the struggle of the people to improve their condition. Now, in our democratic country the members of the profession are not only with the people, but of the people, working among men, advising in their personal affairs, sympathising in their efforts, guiding in their business, aiding in their social movements for reform, taking share in all the departments of public government, yet, withal, maintaining the professional ideals of the past, their intellectual attainments, dignity, strength of honour and independence of character, which will

not cringe before courts or be carried away by popular emotions or a hostile press. The statement made by Thomas Lord Erskine can be repeated by most members of our profession to-day:—

“I will forever at all hazards assert the dignity, independence and integrity of the English Bar without which impartial justice, the most valuable part of the English constitution, can have no existence.”

We do not claim that all members of the Bar are fearless, learned, faithful in the discharge of their duties and governed by the best ethics. We do not contend that all are impartial and of judicial mind or that, as opportunity offers, all wisely and unselfishly endeavour to improve our laws and the administration of justice, for there are some who, looking backward, see only good in the past and refuse to move, while others, closing their ears to the voice of experience, would create all things new on an “a priori” basis. But the aim and effort and trend of the profession is toward its ennoblement and its usefulness. Sir Walter Scott, who by the way was a lawyer, made a fair criticism of our profession and it is as applicable now as in his time:—

“In a profession where unbounded trust is necessarily imposed, there is nothing surprising that fools should neglect it in their stupidity and tricksters abuse it in their knavery. But it is more to the honour of those, and I will vouch for many, who unite integrity with skill and attention and walk honourably upright where there are so many pitfalls and stumbling blocks for those of a different character. To much men their fellow-citizens can safely entrust the care of protecting their patrimonial rights, and their country the more sacred charge on her laws and privileges.”

I think I have thus outlined correctly the spirit, the ideals, the learning and the qualities which characterize the Canadian lawyer and how, as an adviser in human affairs, he accompanies his clients into their respective avenues of life.

If I have, it is manifest that these and his opportunities of

useful service impose upon him duties and responsibilities not only of a private, but public nature far beyond those resting upon persons in other employments. In a general way we recognize this but we do not always give effect to the conclusion that we should do what we are so well qualified to do, both individually and as a profession in which concerted action is not only possible, but necessary for effective work. As a profession in Canada are we not sadly lacking in the "esprit de corps" and wanting in unity? We are a profession and not a craft. We may take lessons from the Dominion Medical Association and the Canadian Society of Civil Engineers and would do well to consider the benefits of existing Dominion associations and business men who in their day and generation are in these things wiser than "the children of Light," their legal advisers. They know the strength coming from unity.

However excellent the British North America Act as constitution of our country, however wise its distribution of legislative powers, it cannot create or assure a real united Canada unless the spirit of union and co-operation is pervasive among the people. Our provinces are far-flung, and feelings of mistrust, lack of sympathy or cordiality, asperities which may have happened between the respective bodies of citizens in the different provinces arises very largely from the fact that the separated communities do not know or understand each other or their aims and ideals or the various steps which may have been taken toward the development of those ideals and the accomplishment of those aims. Yet every true Canadian in his heart purposes a strong, united Canada, founded upon that spirit of freedom, justice and honour inherited from our great ancestors.

True it is that, owing to our historic beginnings, there will be diversity in our population, but that will not prevent oneness. That every diversity in our unity may make for our safety and ennoblement. Different grafts on the one national stem, nourished by the same soil, refreshed by the same showers, gladdened by the same sunshine, bringing forth blossoms of various hues, the people of Canada should produce the one rich

fruit—one true and virile Canadianism. In this our profession has an important and essential part to play.

That country is fortunate which has dwelling in it a body of men, usually dispassionate and just and learned men, who have accommodated the teachings of experience to progressive energy and a wise philosophy and who are willing to advise and assist in its development. There never was a time when the trained and experienced members of the Canadian Bar, mindful of the obligations which rest upon our profession, resting there, because, as in the case of the dove when first sent from the Ark, there is nowhere else to rest, and willing to meet those responsibilities, could render more useful service to our people and country than now, in helping to consolidate our nation and to improve our jurisprudence.

The stated objects of the Canadian Bar Association indicate the path along which, in the public interest and our own, we should proceed. The one first mentioned is:

"To advance the science of jurisprudence." The seemingly proper use of the word "science" in this connection is "a particular branch of knowledge or study." So our Association undertakes to make an effort to advance that particular branch of knowledge—jurisprudence.

This word jurisprudence also has various interpretations. It may mean as one authority states: "Knowledge or skill in law." Thus Blackstone says: "I wish unto him the gladsome light of jurisprudence." If that be the meaning intended in our constitution or in that of the American Bar Association, it seems unnecessary to add the word "science." Another definition is: "A system or body of law; a legal system."

Buckle says the noblest gift Rome bequeathed to posterity is her jurisprudence. The practical result, however, will be the same whichever interpretation is used for if with our profession only resides that knowledge of jurisprudence then on us also is the duty to ourselves and to our country of improving and advancing it.

The Canadian lawyer knows the statement to be inaccurate

that the law in Quebec differs from the law in the other provinces in that the former is the Civil Code, the other the common law, for he knows:

(1) That there applies to all the Dominion that body of the law adopted by our Federal Parliament touching matters within its jurisdiction, e.g., the laws relating to citizenship, crime, the regulation of trade and commerce, banks, militia and defence, patents, etc.

(2) That those questions which come within the public law, using a general term, are governed in Canada, including Quebec, by the law of England as modified by legislation of the central authority.

But, in so far as the provinces have jurisdiction under the British North America Act and speaking generally, the system of law known as the Civil Code of Lower Canada does govern in Quebec and the common law system in the other provinces.

Mr. Justice Cross explained in general terms the difference between these systems:—

“The binding authority of precedents is characteristic of English law. With us the Code is the law whilst decisions are particular applications of the law.”

Dr. F. P. Walton, former Dean in McGill University, in a recent article on the subject of the Legal System of Quebec says:—

“The law of property and civil rights which is peculiar to the province of Quebec has, to a large extent, been codified in the Civil Code of Lower Canada, and in the Code of Civil Procedure the latest revision of which was in 1897. With the exception of the mercantile law, of which an outline is given in the Civil Code, that Code corresponds in form and contents somewhat closely to the Code Civil Français, formerly designated as the Code Napoleon. . . . It is probably true that the Code of Civil Procedure is composed to the extent of one-half or more of rules of English origin It will be seen that the special rules of law peculiar to the province of Quebec are to be found mainly in the Civil Code of Lower Canada, in

the old law so far as this has not been abrogated by the Code, in the provincial statutes and in the decisions of the courts. . . . As early as in 1785 a statute was passed introducing the English rules of evidence in commercial matters . . . After the Cession the commerce of the country, and more particularly the foreign trade fell mainly into the hands of the English-speaking part of the community. Their business was principally with England, with the United States, or with the other provinces of Canada, and all of these countries were governed by the English law. It was natural, therefore, that English commercial usages should become more familiar than French, and that in the courts great deference should be paid to the decisions of English Judges who had explained the English usages. . . . It must not be forgotten that English commercial law in its present shape is mainly the creation of the Eighteenth Century, and is to a large extent the work of Lord Mansfield and other judges who applied in practice and elevated to the rank of rules of law the customs of merchants and the theories about these customs, formulated by civilians, mostly French or Dutch. . . . The commissioners who drafted the Civil Code of Lower Canada state very clearly the difference between the commercial law and the civil law of the province in regard to their origin. They say: 'In a few instances the rules of commercial law may be found in the statute book or in the ordinance of France, but much of it is to be sought in usages and jurisprudence. Our system, if system it may be called, has been borrowed without much discrimination, partly from France and partly from England; it has grown up by a sort of tacit usage and recognition, without any orderly design or arrangement, and has not as yet received any well-defined or symmetrical form from the decisions of our courts . . . Much of what has been established by usage may more safely be left to be interpreted in like manner and to be modified as new combinations and experience of new wants may suggest.' "

To those who give any consideration to the subject it is evident there exists a strong similarity between the provincial com-

mercial law of Quebec just referred to and that of the other provinces. But there are other fundamentals common to the Civil Code of Lower Canada and the common law of the other provinces. Both have one common ancestor, the Roman Code. As pointed out, the Civil Code of Lower Canada corresponds somewhat closely to the Code Civil Français, sometimes designated as the Code Napoleon. The father of that Code was a lawyer, a Doctor of Laws of the University of Pisa, M. L'Abbé who says:—

“de Rome nous avons admis et nous observons encore presque tous les principes de droit privé quoique notre organisation sociale soit profondément différente.”

It is to be noted that in respect of real property the Code of France reproduced the Roman law; it differs from the old English system of tenures, of descent and transfer. This, however, is not material for our consideration for in most provinces the old English system has been so modified by statute as to be scarcely recognizable, at all events, in respect of that portion of our Real Property law in general use. That the Roman law was an important source of our common law is not doubted. Bracton, a Chief Justice of England in the reign of Henry III., about the middle of the Twelfth Century, wrote his commentary. Sir Henry Maine says about this:—

“One of the most hopeless enigmas of the history of jurisprudence, is that an English writer of the time of Henry III. should have been able to put off on his countrymen, as a compendium of pure English law, a treatise of which the entire form and a third of the contents were borrowed from the *Corpus Juris*.”

Later authorities on jurisprudence, however, conclude that external historical evidence and the internal evidence of Bracton's work shew that no inconsiderable part of the Roman law had previously become a component in the English law, and that Bracton reproduced in his work those portions of the Roman law which were in use as part of the English law and usage, and applied by the courts and judges as such. About his day

students were taught Roman law in Oxford: English authors wrote on it. In 1701, Chief Justice Holt, delivering judgment in the Postmaster General's case said:—

“And this is the reason of the civil law, which, though I am loth to quote, yet inasmuch as the laws of all nations are doubtless raised out of the ruins of the civil law as all governments are sprung out of the ruins of the Roman Empire, it must be owned that the principles of our law are borrowed from the civil law and therefore grounded upon the same reason in many things. And all this may be, though the common law be out of mind.”

Baron Fortescue said in another case: “The law books of Bracton and Fleta are the ancient law of the land extending to all cases . . . These law books are so strong, that there has been no way thought of to evade them but by denying the authority of them and calling them ‘civil law’ . . . I have never known them denied for law, but when some statute or usage time out of mind has altered them.”

Baron Montague said:—“It is objected that this is civil law; that may be, and yet it may be and is the law of the land also, and these books are often quoted by the greatest judges and lawyers heretofore in England and allowed as law” (Fortescue's Rep. pp. 401-440).

Blackstone included Glanville and Bracton in the list of venerated authorities. Many of our old and best known common law maxims, forms and practices, supposed to have been born on English soil, were imported from Rome. Mr. Macfarland, at the American Bar Association meeting in 1913, said that “if our common law would return what it took out of the Roman Code it would have nothing left but its barbarous usages and customs.” Time does not permit to enlarge on this.

Not only is there the same jurisprudence in Canada respecting public law and all subjects coming under the Federal jurisdiction, not only something in common in the Civil Code and common law respecting commerce, not only some blood relationship through the absorption of the principles of Roman law,

but there is also a force at work the trend of which is toward greater similarity in that jurisprudence which is under provincial jurisdiction. That force is the insistent demand and urgent need of some codification of the local laws in the provinces where the common law systems prevail. The common law proper is a law library which commences with the year books and ends with the last law reports. If in this library are included the Scotch and Irish reports, our provincial reports and those of the United States to which we sometimes refer, we shall not be far wrong in saying there are seven thousand volumes of reported decisions. Sir Frederick Pollock says that down to 1895 there were over eighteen hundred volumes of English reports alone to which a lawyer is likely to refer. These have increased in twenty years. They contain, I am told, at least one hundred thousand decisions which are constantly being added to. Of Canadian reports there are eight hundred and fifty volumes, and these too are receiving yearly additions. The Canadian lawyer also has to consult the revised or consolidated statutes of the Dominion and of the provinces, and all Acts passed since such consolidation and revision. I find that in 1913 and 1914 the following numbers of public Acts were passed in Canada:—

Parliament of Canada, 116; of Alberta, 50; of British Columbia, 166; of Manitoba, 224; of Ontario, 144; of Quebec, 125 (in 1912 and 1914 no statutes 1913); of New Brunswick, 91; of Nova Scotia, 125; of Prince Edward Island, 43; of Saskatchewan, 67; of Yukon, 27; making a total of 1,178.

Our public Acts are frequently ill-drawn and fragmentary, containing unnecessary, meteoric and disturbing provisions. So the originating member, to the delight of his admiring electors, keeps adding "line upon line, line upon a line, here a little and there a little."

The legal adviser has also to consult hundreds of rules of court made under legislative authority and having the force of statutes.

The publication of the reports has, in too many instances,

been commercialized and the judgments reported in them are not always carefully chosen. Apply the recent statement of Mr. John Bassett Moore respecting American reports to our reports and statutes as well, and we have a fair statement of the case:—"The output is little regulated and with each court (and Legislature) there is connected a pipe to convey its product to the centre of distribution from which, day by day and year by year, there is pumped out as through a great main upon a gurgling, gasping, sputtering Bar a turgid stream of judicial decision and legislative enactment."

And so courts and legislatures go ceaselessly on, piling Pelion on Ossa and an Olympus on both to the dismay of the bewildered lawyer and a helpless people. When will there appear from those modern Sinais a follower of the great law-giver with a suitable Code? It was no flight of imagination, but a statement of fact when Tennyson wrote:—

"The lawless science of the law,
The codeless myriad of precedent,
The wilderness of single instances,
Through which a few by wit and fortune led,
May beat a pathway out to wealth and fame."

It is said that our reports supply such information that no lawyer need take a step in the dark. His difficulty, however, is in groping to find the light in which to make the step. Those judgments come from many courts and judges who have varying qualities and in differing jurisdictions and environments, delivered in different decades and result in an irregular and incomplete development of the law on almost every subject. Great points are left undecided, trivial ones receive elaborate judgments. Judges cannot make a complete law on any subject. The multiplicity and conflict of decisions create uncertainty. Nevertheless, the value of these reports is incalculable; a mine of wealth—they contain the accumulated radium of legal experience of many generations. They disclose an excellent judicial legislation which will benefit both the legislators

and the lawyers. Bentham says:—"It affords for the manufactory of real law a stock of materials which is beyond price. All the libraries of Europe would not afford a collection of cases equal in variety, in amplitude, in clearness of statement, in a word, in all points taken together in instructiveness."

But they are to the legislator, the lawyer and especially to the people a dense and trackless forest, rioting in the luxuriousness of its own riches. It has growth of shrub and clinging vine and tangled under-brush, also great decisions like trees of giant bole which have weathered the tempest shocks of centuries.

What then is the remedy? What else can it be but to compress, to write the principles which have been settled by decisions or statute in a well arranged Code? In 1886 the American Bar Association, led by David Dudley Field and John F. Dillon, after hearing a number of eminent lawyers, resolved:—"The law itself shall be reduced, so far as its substantive principles are settled, to the form of a statute."

Of the three varieties of codification the one thus suggested seems the most likely to be adopted because the least disturbing and the most practicable, namely the preparation and legislative enactment of a digest of the established principles of the existing law.

A second form of codification is to use the existing law as a base and amend it as may be deemed advisable for the purpose of removing anomalies and then enacting it as amended. This was the principle under which the French Civil Code was formed and it has stood the test of a century with but little change. The Roman Code upon which it was based has the longest known history of any set of human institutions.

The third form is a philosophic code as advocated by Bentham, the adoption of a purely ideal system of laws founded on reason and natural justice. This, however, is not feasible, for no people are likely to abandon the reasonably good body of law evolved in their country for the scheme of a philosopher however excellent. No code of the English law or any of its branches has been of the third class.

(The speaker then referred to some attempts at codification in bygone days and then proceeded) :

Let me now state shortly some of the reasons which have been urged in favour of such codification :—

(1) The same persons should not be both lawgivers and judges. The common law grew through the formulating of its principles by judges. To the extent to which they participate in varying the law or developing it for new circumstances, the law becomes uncertain and post facto. A proper code would impose some check upon the license of judicial liberty and discretion by creating a fixed body of principles which would be a moral necessity, and a departure from which could be detected and corrected.

(2) The laws of the land are for the people of the land. Those who are to obey them should have some opportunity of knowing them, or, at least, their general principles. The people desire to know their rights and duties that they may assert the one and perform the other. Lack of knowledge of the law, and its uncertainty weaken reverence for the law.

(3) Codification would remove technical, obsolete and useless parts, clear up doubtful and fill up gaps covered by conflicting decisions, and would be of orderly arrangement and comprehensive without being vague, making simple what is now complex, systematic what is now chaotic.

(4) New rules to meet new conditions can be more easily grafted on a statute or code than on the common law.

(5) The involved condition of our law makes specialization necessary and centralization, a consequence which would be avoided somewhat by code law.

(6) It would to lawyer and judge save time and worry ferreting out the law. The feasibility of a Code has been demonstrated by other countries. Codes have been adopted in modern times by most of the nations of the European continent and recently by Japan, also by some of the United States.

(7) In those countries where the common law prevails and

in Canada, the tendency and quiet movement is towards codification.

(8) It is impossible to over-rate the benefits of bringing the laws of the different provinces into substantial harmony by a codification of the great underlying principles more or less common to all.

One reason and perhaps it is most forcible of all for keeping the codification of the common law continually in view, is its influence on the unification of law throughout the Empire. Most of the improvements in the form of the English law are followed up after no long interval by substantially identical legislation in the British Dominions. The Bills of Exchange Act, the Partnership Act and the Sale of Goods Act, for example, have been adopted almost everywhere in British Dominions. The Criminal Code recommended by the English Commissioners but not yet adopted by the British Parliament, was enacted by our Federal Parliament. The Bills of Exchange Act has largely influenced the enactment of the Negotiable Instruments law which has now been adopted in nearly all the States and Territories of the American Union.

What Rome did under equally difficult circumstances, what other intelligent and strong nations have done, Canadians can do. This youngest of the nations, heir of all the ages, was not born for a position of insignificance but of greatness. It needs the leadership of our best jurists and lawyers.

In addition to the tendency in the common law provinces toward a form of codification such as prevails in Quebec and leading to a greater similarity of Canadian jurisprudence, there are other influences ceaselessly at work to create a more general and better jurisprudence. The convenience of inter-provincial business requires it. Time and the fact that we will be addressed on this subject by another better qualified to speak prevents further statement from me on it.

Let me only say that history shews how fatuous and destructive is any attempt of any considerable body of people to coerce into uniformity with their own the conflicting ideas and con-

ceptions of the intelligent people of any province, state or nation. The Egyptians failed to force into uniformity with their own the Israelitish notions and conceptions; the Hebrews, though thinking themselves the Chosen People of God and the Gentiles His and their enemies who merited destruction, failed also; so did the Macedonians at Thebes, Germanicus with the Marsi, and Cromwell in Ireland. The Religious Wars of the Middle Ages and the Thirty Years' War abound in illustrations of the utter futility and disaster of such attempts. So too will fail the great War Lord of Germany, his military advisers and cohorts, to impose their boasted "Kultur," their civilization, their religion of valour upon unwilling nations.

The Canadian Bar Association has no such passion for uniformity. The powers which make for the development of any country and its unity are peaceable yet powerful. They are those of mind and heart and conscience combined with energy. The rules which regulate these are the inhering laws of human nature which are as constant as matter and its universal laws. As the people of Canada approximate in these attributes and qualities, and they will, as the demands of business convenience increase, similarity of law will necessarily result. Our common law judges and our legislators have not created law; they have formulated it to express the wish and needs of the people as rules to guide in the changed and ever changing conditions of society. The law of a country is the responsive expression of its social and business life and it must expand with it, or hamper it. The ever advancing and altering relations of society and individuals, new fields of human activities, new modes of thought, increase in knowledge demand modification of the old rules and the adoption of new. This has been the teaching of history—"the old order changeth giving place to the new." Custom may shudder at the lack of veneration for the old and at the boldness of young enterprise; grey-bearded use leaning on its staff may wonder where all this is going to end. We sometimes forget the truth that:—

“Old decays but foster new creations.
 Bones and ashes feed the golden corn,
 Fresh elixirs wander every moment
 Down the veins through which the live past
 Feeds its child—the live unborn.”

These new creations need suitable laws and an adequate jurisprudence. Who can provide it? The conditions are not dissimilar to those of Rome in the days of Justinian when the people looked to the lawyers and jurisconsults to aid them. They did not look in vain. What the lawyers did in the time of Justinian surely we having the advantage of all the past knowledge can do and more. It is significant that those ancient lawyers and jurisconsults often assembled for discussion at the Temple of Apollo and also that the people of Rome selected a house in a frequented street and gave it to one of their great jurisconsults, Scipio Nascia, that he might be ever accessible to them. They gathered knowledge in the secret places of wisdom and gave it to the people among whom they dwelt. So may it be with our splendid profession in the advancement of jurisprudence and the improvement of the administration of justice.

None can so aid the Canadian people as the members of our Bar. In the common judgment of the people, the profession of the law, as they call it generally, and its learned and gifted members are held responsible for what is weak, uncertain and wrong in the law or defective in its administration, and justly so in our democracy for on whom else can they depend to advise and pilot them to better things. Let us not then withhold good from those to whom it is due when it is the power of our hand to do it. Canada has good statesmen and political leaders, but if our skilled lawyers will unite in wisely and energetically carrying out the purposes of the Canadian Bar Association they will confer a benefit upon the country more general and lasting than that of statesmen and politicians.

THE HONOUR OF THE PROFESSION.

BY E. F. B. JOHNSTON, K.C.

One of the chief objects of the Canadian Bar Association is set forth in the first article of the Constitution, namely:—"to up-hold the honour of the Profession." Perhaps it would be interesting to view this question from a standpoint somewhat apart from the line of the usual addresses delivered on such subjects as,—“The Bench and the Bar” and other similar topics, the treatment of which has become more or less commonplace. I shall, therefore, eliminate all consideration of the individual and the details which go to make up the daily round of professional life, except matters arising by way of illustration. I think the discussion of the question should be on a broader and higher plane than mere personal qualification, and should involve a consideration of matters pertinent to the profession as a whole. It is easy to lay down general principles which govern, and it is easier still to point out many of the principles which should govern and do not. But the subject is somewhat complex. The Bar as a whole is a most important element of the social, business and political life of Canada. The lawyer in towns, and even in large cities, occupies a somewhat individual position. He is admittedly an educated man, and is supposed, at any rate, to be a gentleman by Act of Parliament, and, therefore, the profession of law, according to the conduct of its members, must add to or detract from the social plane of the immediate community. The legal profession has also necessarily much to do with business relations. The lawyer is the guide and adviser in all matters of doubt and conflict. To a very considerable extent, his wisdom preserves the integrity of the business client, or his lack of probity or want of high moral sense may degrade the business of his clients to a mere matter of money, and perhaps to methods of sharp practice as regards creditors, and others incidentally interested. In the political world, lawyers have ever taken a very strong and important position. The men who do the really hard work of a campaign

are lawyers. Perhaps their desire to hear themselves speak, or to practice oratory on the electors, may have something to do with this. I am rather inclined to think, however, that it is not owing to either of these causes, but more to the fact that the leading thinking men of the community belong to the legal profession, and are in demand on account of their competency. The training which lawyers get both professionally and by practice is such as fits them peculiarly for the discussion and solving of difficulties which arise in the political or public field. With matters of this nature, I am not so much concerned. As regards the honour of the Profession, it will be more useful to deal with the matter upon a much higher basis than this, and, therefore, the subject comes peculiarly within the province of a widely extended body like the Canadian Bar Association.

The honour of the Profession depends largely upon the reputation and conduct of its individual members. Lawyers as a body have not always achieved the highest repute in the opinion of many of their fellow-citizens,—too often unjustly due to the acts of a few individuals, who unfortunately happen to be members of the Profession.

The first great object to be kept in view is a high standard of morality. A man who lives an immoral or improper life as regards his ordinary business dealings, or his character, does much to impair the general reputation of his class. If a man is judged by the company he keeps, the company is equally judged by the conduct of some of the men who compose it. A man who is seldom sober, who fails to meet his moral and financial obligations, and who disregards the calls of a good life, should not be a lawyer. It will be said that as regards this phase of the matter, the Profession has no concern. I think differently. I see no reason why the Profession of law should not adopt some well-defined rule, as one finds in the profession of the ministry. A man's personal conduct has everything to do with his professional duties. His clients are entitled to the best that his mind can give them, and if that mind is debased or clouded by his own acts, he is not in a position to fulfil the conditions

and the privileges conferred upon him by the governing body. His average life, if of a high moral character, adds very materially to the repute of the profession to which he belongs, and if he lowers the tone of that life by misconduct or bad living, he unconsciously lowers his profession in the eyes of respectable men. If all lawyers were immoral in their living, or otherwise disreputable, the Profession would become out-cast and condemned. If they were all upright men, the Profession would stand as the highest and noblest calling in the world. The question is one of degree and comparative standing, and the nearer we individually approach to the ideal, the higher will be the plane reached by the organization of which we form a part.

Another element to be considered is this: How shall we uphold the honour of the Profession, except by uprightness in the practice of it? I am not referring to the matter of uprightness in the sense in which it is used by religious denominations. What is meant is the high sense of honour of each individual, the aggregate of which is crystallized in the words of my subject. What are the objects of the lawyer's calling. Amongst others, there is the conscientious performance of his duty in aiding in the administration of justice and law. There is also the desire to see that no undue advantage is taken as regards others. There are rights due by our Profession to persons other than our own clients. Do we uphold professional honour by sharp practice, or by laying traps for an unwary antagonist to fall into, and by this method seek to advance our case at the expense of an innocent man? If we believe in truth and honesty, are we justified in concealing facts which, if known, might militate against our clients. Are we acting uprightly when we keep a witness hidden, or a fact undisclosed, which we admit would be most important in its bearing on the issue? In other words, should we not all unite in dealing frankly with each other, and with the judges and the public, and lay bare the actual truth, and on that, and that alone, ask that the very right of the issue be determined. We might ask the question,—Why we do not come into court with full disclosure, and many

lawyers would answer quite conscientiously, that the case against his client must be proved according to law, and that his duty is to present the best possible phase of the matter on his part, and not to help the opposing counsel, or his client, in the conduct of his action. Let me put a case,—Suppose that a lawyer knew of a fact capable of proof, which, if known to the court or jury, would have brought about a totally different verdict, and that he not only concealed the fact, but kept back witnesses on his own side who would have proved it, would he say that such an act tends to uphold the honour of his Profession? And yet, we nearly always consider what we shall prove or withhold, and the reputation of counsel often depends on his skill in this kind of mental and professional warfare. If we examine the matter more closely, we can readily find the reason. The cause of this is egoism, the desire to win, and the flattering sensation of winning, due more to our personal vanity than to anything else. The reputation we make, and the consequent profits have an equally egoistic influence. It has nothing whatever to do with the question of right or wrong from an ethical point of view. It is the result of the system and practice of law as applicable to the individual. I am not prepared to answer what should be done in such cases, as I am illustrating, but I do know that it would add greatly to our professional honour, if we all united in endeavouring to approach a more ideal position on this point than we occupy at present. About one thing there is no doubt, the attempts, sometimes successful, at sharp practice, are a most objectionable part of a lawyer's professional conduct. Lawyers who are guilty of this, consider it clever and a mark of astuteness on their part. They are mistaken. No truly great lawyer was ever guilty of sharp practice, and the men who are guilty of it command neither the esteem, nor the confidence of their brethren. Good tactics are worthy of praise. Sharp practice is bad tactics and disreputable. We cannot hope to raise or keep our Profession at a high level unless its members are fair and broad-minded men. The complex system of law and procedure has much to do with the matter I am discussing.

A technical and complicated system means advantage to the unscrupulous and crafty mind, but these become disadvantages when they re-act on the honour of our Profession. The keeping of one's word in litigious proceedings is essential, and I am glad to say it is the rule and not the exception. But there is a tendency on the part of too many solicitors and counsel to take paltry advantages when their opponent has made a slip, or overlooked some technical matter. So much was this the case in former days, and so unjust and contrary to the cause of right and justice that the law was amended, and made to conform to equitable principles, in order to checkmate the practice which enabled a cunning solicitor or advocate to defeat the action of the opposing party by reason of the ingenuity and craft of the sharp practitioner.

When we come to deal with the question of the honour of the Profession, as relating to the Bench, the matter becomes more difficult and delicate. How does the professional honour stand in such relation? We all wish to stand well with the judiciary, and I mean by that, to have their respect and confidence. Do we always merit this respect? The obscuring of the real issue by a multitude of authorities cited by counsel is not infrequent. The attempt to present a legal argument along untenable lines is not uncommon. The twisting of precedents and principles to meet the views of the advocate is considered fair argument by some counsel, and a strenuous contention along this line is often made in the hope that it may convince some member of the court, but it frequently results in the judge promptly placing the offender in this respect on his proper level. Confidence is weakened and suspicion is aroused, and the lawyer is carefully watched in the future lest he mislead or deceive the court. The professional honour is affected, and the innocent often has to suffer with the guilty. The statement of facts is sometimes colored; sometimes unconsciously, to suit the bias or partisanship of the advocate, or the necessities of the client's case, and the delicacy of that fine sense of honour of which we boast is dulled and vulgarized by the violation of the elemen-

tary principles of fairness and honest dealing, which are vital and honourable, and can only be maintained through the high character and conduct of our members. We cannot always agree with the methods and views of our judges. It would be incorrect to say that all members of the Bench are of equal degree of merit, knowledge or ability, or that every judge is entitled to the same amount of confidence which we give to some of them, but I believe we yield to all of them that respect and regard to which their high positions entitle them. We should see that by our own conduct, we merit their continued confidence and respect, and thereby add to the reputation of the Bar in the mind of the Judiciary, by the correctness of our statements and the fairness of our arguments on the presentation of the cause of our clients.

I believe we can also aid materially in upholding the honour of our Profession by putting our position as regards our clients on an impersonal ground. If a lawyer, whether solicitor or counsel, so identifies himself with the rights and wrongs of his client, that they become more or less personal in his relations, and if he makes the case his own, he fails to appreciate his rightful attitude and imparts into his professional duties feelings and prejudices which no honest lawyer should permit. Then follows the bitterness, and perhaps vindictiveness of the client affecting the issue, and its effect on his lawyer who fails under such feelings to conduct the litigation on a proper and impersonal basis. The identification of the lawyer with his client's temper, and perhaps spite, obscures the legal mind, and the battle becomes one of personal attack and reprisal. The dignity of the Profession is lost sight of. The contest degenerates into a police court squabble, and recriminations and unfair methods take the place of that dignified state of affairs which should be maintained at all cost. The lawyer must, of course, generally trust his client, and be trusted, and should bring all his energy, industry and talent to bear in favour of the client, but he should never forget that the wrong is not against him, and that he can best serve his client's interest by being

free of the unfortunate condition of mind and heart which affects the client, often to the extent of blinding his eyes to the real facts.

Perhaps one of the most dangerous causes at work affecting the reputation of our Profession is the scheming for business. In most places particularly where there are large factories, electric railways and similar undertakings, involving great personal risk, there are always a certain number of lawyers who appear on the scene in company with the ambulance or the coroner. Men, not lawyers, have to my knowledge been employed by legal vultures, and have received a commission on bringing in the body dead or alive. Retainers are promptly obtained, and actions are brought again and again, on purely speculative grounds. Relying on the sympathy of a jury, defendants are put to heavy costs, with no chance of getting a dollar from the plaintiff, and with many chances in favour of a substantial verdict against them, particularly in actions against large corporations. I have often thought that the most bitter comment on the system of trying such cases is to be found in the Ontario Municipal Act, which in many cases now directs that the trial shall take place before a judge alone. And a still more sweeping condemnation of our practice is the Workmen's Compensation Act just come into force in Ontario, which now deals with a vast body of cases on the principle of insurance against accidents. If we could have continued the old experience of thirty or forty years ago with lawyers above suspicion, the jury system would still remain as it was intended to be—a bulwark against wrong-doing, and a tower of strength in the administration of justice. The soliciting of business in the manner I have indicated should disqualify any lawyer from ever practising again. And so with speculative litigation. Nothing is so destructive to the reputation of the solicitor, or to the legal profession generally, as the promoting and carrying on of cases on a purely speculative basis. It is unjust to the client, most dangerous to the community and absolutely demoralizing to our whole system of jurisprudence.

Another matter which is bringing the practice of the law into disrepute is caused by the strenuous effort of many Crown Prosecutors to obtain a conviction. Listening to some of the cases tried in our own courts, one would be forced to the conclusion that the fee and the oratorical fame of the Crown counsel were on trial and not the accused. Here again we find the value of the impersonal. I have always believed that the Crown officer has no brief to win, and no cause to lose. He is appointed to represent the fountain of justice, not to further the too often unscrupulous work of ambitious detectives. To my mind, incapacity along fair lines, and a consequent acquittal, are infinitely preferable to the conviction obtained by the counsel, whose conduct is governed by the dominance of one objective point—success. The honour of our Profession must depend on the exercise of the highest principles of fair play, and the true administration of that part of law which falls to the lot of the practising lawyer.

There are many other matters one would like to discuss regarding the assets of professional honour. What I have mentioned as examples to illustrate some evils are, I am glad to say, not the governing factors of the average lawyer's conduct. The Bar of Canada undoubtedly stands high in the estimation of our people, and of the citizens of the neighbouring Republic. Most of our solicitors in Canada are working along lines of probity and professional honour, and the majority of our leading counsel and advocates are actuated by feelings and motives that go to build up a great reputation. They are trusted and worthy of trust. The temptations in their calling are very great, and I have often been surprised that so few fail in the resistance. We must expect some failures. Was it not Sir Walter Scott who said that the legal profession was like a great chimney through which the ashes and soot and bad feelings of humanity passed, and that it would be marvellous if some of the soot did not stick in its passage.

If morality is the true basis of law, every effort should be made in laying the foundation to see that the craftsmen are

actuated by a proper sense of morals and a regard for professional ethics of the highest type. The great principle underlying all civilized law is one which seeks to provide a remedy for wrong-doing, a protection to individual and public rights, and a degree of justice to all. The basic element must, therefore, be one of morality. The administration of laws depends on the character of the men who are engaged in their observance and enforcement. A poor law honestly enforced is infinitely better than a good law corruptly administered. What are we doing to see that this doctrine is carried out in practise? We are careful and exacting in the mental and legal training of our students, and we are apt to conclude that those who pass academic or highly technical examinations are eminently qualified to practice. But if they have not been trained in the fundamental elements and imbued with a proper sense of the morality of law, the most important feature of their ground work has been omitted. When I refer to "Moral Ethics" I mean those which belong peculiarly to the practice of our Profession, and not to the general code of morals which may be classed more properly as appertaining to religion. The idea is more correctly conveyed by the expression "Moral Ethics." This subject is not even hinted at so far as I know, in the curriculum of the ordinary law school in this country. Our students are carefully educated in all the legal niceties of contracts, but the honesty of the contractual relation is not dealt with. The cleverness of some lawyer may enable him to say of his opponent, "Well, I got the start of him on that deal." His mind is not affected by any well defined principle of right that should have been impressed on him in his student days. He does not feel that the transaction may be one contrary to all teachings of moral ethics, and which he should have squared on the ground of conscience and not on legal expertness. In this connection, I am, therefore, taking the liberty of making a suggestion, which is simple, and would, I believe, be most beneficial.

There should be a branch of law within the purview of the

students' legal training prominently dealt with under the head of "Moral Ethics." Lectures on this subject ought to be regularly given, and some methodical system adopted whereby the young mind should be impressed with their importance. If leading members of the Bar in each province would give this matter a little time, and deliver a few pointed lectures to the students each term, it would enure materially to the honour of our Profession. As the students pass to the practice of law, and meet with the practical problem awaiting every practitioner, they would often be reminded of the question of moral relations and proper conduct in the application of legal principles. I would go further than this and endeavour to enlist the sympathy of the judges of the Superior Courts in this respect. Especially it would be valuable to secure the Chief Justice of the province to give two or three addresses to the students in each year of their studies. Coming from the recognized head of the Judiciary, such lectures would carry great weight, and have unquestioned force in the minds of young men whose lives are undergoing a process of definite formation. The whole objective point of a lawyer's life is not the winning of a case, or the acquisition of a thorough knowledge of law. There are other qualities and victories equally important, and equally conducive to the elevation of a profession, of which he forms a part. In addition to this, we must not forget that we are officers of the courts, and it is in the interest of every court that its officers should be properly instructed in all that goes to make for moral efficiency and a clean professional life.

Much of what I have said applies only to the small minority, who in any calling would not regard very highly either the honour or the dignity of their vocation. Notwithstanding this element, the Bar of Canada, as a whole is something we have every reason to be proud of. The lawyer who conducts his work properly, and in the true spirit of the advocate, is the man who eventually stands at the head of reputation in his own town or village, and those who have greater ability, and are of equal integrity find in the larger centres, avenues to the highest and

most responsible positions in the service of their country. That such is the moving spirit and objective point of this Association is matter for congratulation, and if this body does no more than uphold and add to the honour of the Profession, it will serve a great and noble purpose.

I am not presenting this address with the object of encouraging undue criticism, or on the ground that I am any better than my fellow practitioners. Rather, I am submitting some views which may aid your worthy Association in its development, and, whilst I am conscious that much of what I have said is common knowledge, my remarks have at least the merit of being the result of considerable experience at the Bar, and the expression of a line of thought absolutely independent.

UNIFORMITY OF LAWS IN CANADA.

BY EUGENE LAFLEUR, K.C.

In the minds of many Quebec lawyers the mere title of my subject will arouse antagonism and alarm. In 1663 Louis XIV. cancelled the charter of the One Hundred Associates and introduced into this country the laws of his realm, and from that date until the present time the civil laws of France have been in force, except during the brief interval between Governor Murray's proclamation in 1763 and the Quebec Act of 1774. The last mentioned statute recognized that the provisions of the proclamation, including the introduction of the laws of England into the colony, were inapplicable to the state and circumstances of the province, whose inhabitants had enjoyed a system of laws by which their persons and property had been protected, governed and ordered for a long series of years from the first establishment of the province, and in consequence restored the old laws of Canada. Throughout all the subsequent constitutional changes this system has been maintained, and section 94 of the Confederation Act of 1867 in providing that the Parliament of Canada may make provision for the uniformity of laws relative

to property and civil rights in the other province of Canada (with the concurrence of their respective legislatures) omits Quebec from the enumeration of provinces affected by this section.

No wonder, then, that the Bar of this province should look with suspicion upon any project which may see to have for its aim the submergence of the civil code in the rising tide of the common law around its borders.

Let me at once dispel all such apprehensions by saying that the movement in favour of uniformity which took its rise in the great Republic to the south of us does not contemplate any constitutional changes or the impairment of provincial autonomy. Mr. Terry, the president of the Commissioners on Uniform State Laws, in his admirable address delivered at Washington in October last, said:—

“We are not advocating centralization of Government. We are not advising the obliteration of states lines. On the contrary, we would depreciate the former and warn against the latter. Our faith in the dual sovereignty, and the nice checks and balances of our system of government has grown in these latter days, as the assaults upon it from both friends and foes have disclosed at once their own futility and the inherent soundness of the object of their attack.”

And so in our own case no one to-day advocates the establishment of legislative union, which some of the Fathers of Confederation would have preferred to the present division of legislative powers. Besides, legislative union does not necessarily mean uniformity of laws. You have a familiar example in the case of the British Parliament which preserves the common law for the English and the civil law for the Scots. We ourselves tried the experiment from 1841 to 1867 when we had a common parliament for Upper and Lower Canada which dealt out English law to one province and French law to the other. Even the Autocrat of all the Russias maintains German law in the Baltic provinces, French law in Russian Poland and Swedish law in Finland. Nor does the project which is submitted to

your consideration aim at the fusion of the two great systems of law which prevail in Canada. It is not that the task in itself is an impossible one. France and Germany have, indeed, achieved success in this direction under conditions even more complicated than our own. In France the Roman law prevailed in the south, while Teutonic customary law prevailed in the north.

And there were sixty general or provincial customs, and three hundred local customs governing civil rights in cities, towns and villages. Such was the chaos of jurisprudence which the framers of the Code Napoleon were called upon to harmonize. In Germany there were four great systems of different origin, and an infinity of local customs which sometimes differed in the same town according to the side of the street on which you lived. However discredited things "made in Germany" may be to-day, there can only be one opinion as to the wonderful achievement of the juriconsults who out of this welter of diversity constructed the German Civil Code.

But however successful the great unitary systems may have proved to be in welding together and strengthening the nations which have adopted them, our choice has been made in favour of less centralization and more local autonomy.

Recognizing the definitive character of this choice, the constitution of the Canadian Bar Association, in the enumeration of its objects, sets forth that one of them is to "promote the administration of justice and uniformity of legislation throughout Canada so far as consistent with the preservation of the basic systems of law in the respective provinces."

Our programme, in fact, is identical with that of the American Bar Association which about a quarter of a century ago started the movement for unification in the United States. There, as you know, the antagonism which began in the time of Hamilton and Jefferson between Federalists and States Righters has been far more acute than our own controversies with respect to Dominion and provincial powers, and the American constitution confers far less powers on the central government than

the British North America Act does on the Dominion Parliament. But notwithstanding this handicap a large field for useful work has been found and a remarkable achievement has been recorded. A glance at the history of this movement may set us thinking as to the applicability of the methods employed to our own conditions, and suggest the extent to which we may follow along those lines.

The efforts of the American Bar Association resulted in the creation of a commission on Uniform State Laws. This organization consists of commissioners appointed by the governors of the different states, territories and possessions of the United States for the purpose of drafting and recommending for adoption by the various legislatures, forms of bills or measures to make uniform the laws of the different jurisdictions on which uniformity seems practicable and desirable. In every state of the Union (48), in every territory and possession, including the District of Columbia, Alaska, Hawaii, the Philippine Islands and Porto Rico, commissioners have been appointed, and twenty-four annual conferences have been held since 1892. From the report of the conference held last year, it appears that the Negotiable Instruments Act, adopted by the conference of 1896, is now the law in forty-seven states, territories and possessions; the Warehouse Receipts Act is in force in thirty-one; the Sales Act in eleven; the Bills of Lading Act in twelve; the Stock Transfer Act in nine; the Act Relating to Wills executed without the State in ten; and the Family Desertion Act in eight.

Reports have been presented on the Uniform Incorporation Act, the Unification of Commercial Law, the Uniform Partnership Act, Wills, Descent and Distribution, Insurance, Workmen's Compensation Act, Situs of Real and Personal Estate for purposes of Taxation, Automobile Legislation, Uniformity of Judicial Decisions, and on various other important subjects.

It is worthy of note that the State of Louisiana which, like the Province of Quebec, is governed by the civil law, has participated in the movement for uniformity and has up to this

date passed seven out of the nine measures presented to its legislature for adoption.

Such are the results of an undertaking which was at first regarded by many of the profession with skepticism or indifference. The pioneers who devoted their time and energy to this disinterested and patriotic endeavour are now reaping their reward, for their educative campaign of twenty years has secured them the sympathy and active co-operation not only of statesmen and lawyers throughout the country, but also of the commercial and industrial community.

It will be interesting to you to hear that the mere publication of our own programme in this country has already aroused an interest among merchants and manufacturers, and that our President has recently received letters of encouragement and offers of assistance from representative bodies.

Let us now consider the subjects upon which it would be desirable and practicable to aim at greater unity without disturbing any fundamental principles in the basic systems of the several provinces of Canada, and without trenching in the least degree on treaty rights and historic traditions.

In no field of jurisprudence will greater unanimity be found to exist in favour of more uniformity than in that of commercial law. There are really no obstacles in our way for the principles of the "law merchant" are much the same all over the world, and even in countries where ordinary contracts are governed by the civil law, mercantile relations are frequently regulated by a commercial code based on international usage. Moreover, in Canada, a very important part of this field is under the control of the Dominion Parliament, and we have Federal codes on Bills of Exchange and Promissory Notes, Banks and Banking, Savings Banks, Navigation and Shipping, Patents and Copyrights, Currency and Coinage. The Canadian Parliament has also exclusive legislative jurisdiction over Bankruptcy and Insolvency.

As to the portions of mercantile law not committed to the legislative action of the central parliament, there can be no

difficulty in harmonizing the law of all the provinces whose systems are derived from the law of England. And even as to Quebec the differences in the law on this subject are negligible. The codifying commissioners in their report on the fourth book of the Code dealing with Commercial Laws state that our system has been borrowed without much discrimination partly from France and partly from England, and that the laws of commerce are of universal application and for the most part differ little in different countries except in matters of detail. Again, the law of evidence in commercial cases is of English origin, and our Code provides (C.C. 1206) that, except in the rare cases where special provisions are contained therein for the proof of facts concerning commercial matters, recourse must be had to the rules of evidence laid down by the laws of England.

It is unnecessary to state that our merchants and manufacturers, from Halifax to Vancouver, would welcome as an inestimable boon the unification of our commercial laws.

No one realizes as keenly as they do that diversity and multiplicity of laws in a great commercial community means a fixed charge on any business for legal advice and litigation, and a corresponding diminution of profits. Really, the only people who might be supposed to object to a simplification of the law are the lawyers themselves, who might be driven out of business. But, while it seems to be regarded as axiomatic that our manufacturers need protective legislation, I have never heard it contended that the activities of the legal profession require any artificial stimulation.

What could be more beneficial to the business community than a uniform statutory code on Commercial Sales? No difficulty has been found in applying the "Sale of Goods Act" to England and Scotland, and we have seen that the "Sales Act" has already been adopted in eleven jurisdictions in the United States.

The law of Insurance in Canada presents an example of wasteful and unnecessary discordance. Every province has an insurance law of its own, for the most part in the form of a

statutory code, and while these systems are not differentiated by any fundamental principles, they abound in minor diversities calculated to produce conflicts and uncertainty. For instance, the statutory conditions prescribed for insurance policies vary in the several provinces, so that a great transcontinental railway is unable to get a uniform cover on its rolling stock throughout Canada, but must submit to a modification of its contract every time it crosses a provincial boundary line. The matter is further complicated by the fact that a Dominion Insurance Law is superadded to the various provincial enactments, and the companies must satisfy the requirements of nine or ten insurance departments before they can do business throughout Canada.

Further confusion is created by the fact that certain portions of the Dominion Insurance Act have been held to be unconstitutional, and the matter is still pending before the Privy Council. How much better it would be for insurers and insured if we could standardize the policy conditions and have a uniform Insurance Act adopted by all our legislatures?

Our Company Law is in an equally unsatisfactory condition. There are nine different kinds of provincial laws governing joint stock companies, and a Federal law in addition. The provinces are given the power of incorporating companies "with provincial objects" and the Dominion incorporates those whose objects are not so restricted. We have been litigating for years in order to ascertain the scope and meaning of these restrictive words, with the result that a great diversity of judicial opinion has been expressed, and that this question is also awaiting the decision of the Judicial Committee. Whatever the answer may be, it will not abolish the needless contrariety of these ten different systems, nor give our Company Law the simplicity, certainty and uniformity which is so desirable if we intend to go on floating our securities abroad. In the address to which I have already referred, Mr. Terry informs us that in the United States the sentiment is unanimous in favour of a Uniform Incorporation Act which will bring about "corporate regeneration" and

do away with "the fierce competition of various states to secure, at any cost of state dignity, and at any sacrifice of the duty to observe state comity, the revenues which result from offering in the corporate market a maximum of powers with a minimum of responsibility." I am afraid that some of our Canadian corporations have likewise been conceived in iniquity and born in sin, and that they too require to be born again under a new and uniform system in order to become innocuous. This is especially true in the case of corporations obtaining special and exorbitant powers from the legislatures. This evil would probably be lessened, and the legislatures would doubtless be more discriminating, if a uniform law of incorporation were adopted throughout Canada.

Our provincial taxing statutes furnish a conspicuous instance of overlapping and conflicting legislation resulting in manifest injustice. As you know, the local legislatures have the power of imposing "direct taxation within the province." Whether you determine what is within the province by reference to the domicile of the owner or to the local situation of the property, it seems clear that the British North America Act did not intend that the same property should at one and the same time be regarded as being within the Province of Quebec and within the Province of Ontario. One or other of the rules as to *situs* must be adopted, but both should not prevail so as to expose the taxpayer to double taxation. And yet the ingenuity of the Treasury Draughtsman in all the provinces is exercised in reaching out beyond the jurisdiction. Take, for instance, the Ontario Amendment to the Corporations Tax Act, 1914. It purports to impose a tax calculated upon the gross premiums received by insurance companies in respect of the business transacted in Ontario, and then proceeds to enact that a premium is deemed to be in respect of business in Ontario if it is payable or if it happens to be paid in Ontario or if it is payable in respect of insurance of a person or property resident or situate in Ontario at the time of payment, even where the business is transacted wholly outside of Ontario. Inasmuch

as Quebec also imposes a tax on gross premiums, these companies are inevitably exposed to double taxation on the same business. Again, take an example from Quebec. The Succession Duties Acts, 1914, tax property actually situated within the province even where the transmission takes place outside of the province, and also tax the transmission in the province of property situated outside. Similar provisions in the Ontario Act bring about the inequitable result that the same property is twice taxed for succession duty.

The law of Wills offers great opportunities for improvement. It should be easy to standardize all matters relating to their formal validity, so as not to defeat the clearly expressed intentions of testators. For instance, why should a holograph will, validly made according to the laws of Quebec, be inoperative as to real estate situated in the other provinces (*Ross v. Ross*, 25 S.C.R. 307.) ? Why should the rules governing the revocation of wills be different in different provinces, so that a person making his will when domiciled in one jurisdiction unwittingly revokes his will by becoming domiciled in another jurisdiction and marrying therein, although no such revocation would have taken place according to the law of the original domicile (*Seifert v. Seifert*, 7 Ont. Weekly Notes 440) ? Again, there is urgent need for the adoption of uniform rules for the distribution of estates when the property, both moveable and immoveable, is situated in different jurisdictions. In no province is the machinery adequate for such purposes; on the contrary, there seems to be an almost total absence of such ancillary provisions as an enlightened spirit of comity between provinces would suggest, in order to facilitate the prompt and inexpensive distribution of the estates of decedents.

Equally objectionable is the diversity in the rules governing the authority and effect in one of the provinces of judgments rendered in another. In order to facilitate the adoption of uniform rules on this subject it may be advisable in the first place to render uniform the rules of procedure relating to the assumption of jurisdiction by the courts of the different provinces,

so that there may be as little overlapping and competition as possible.

Even when we are legislating upon new questions of general interest which transcend the bounds of the province and which have no foundations in the past, we work in isolation instead of in concert. The Workmen's Compensation Acts are not based on the existing law of torts in the several provinces, but on the contrary involve a distinct departure from traditional principles. They embody a new theory which recognizes the inadequacy of the ordinary legal principles of responsibility, and which substitutes therefor the view that risks incidental to a business should be a charge on that business. This was pre-eminently a case for co-operative effort in order to produce uniformity of treatment throughout the whole Dominion, instead of allowing separate provincial commissions to create diversity and conflict where none previously existed. As a result we have confusion, uncertainty and contrariety, where it would have been humane to make the law simple, sure and uniform, and to produce a measure that would not have compelled the unfortunate victim to go through two or three courts before ascertaining what his rights are.

Not only does the substantive law invite the efforts of the reformer, but also the law of procedure. Many a suitor is deterred from pressing his claim in a sister province by the unfamiliar terms and methods employed in another forum than his own. Here, at least, we should not be hampered by the traditions of the past, for archaic forms and practices are survivals of a period when the rights of the litigants were too often lost sight of in the intricacies of procedure. Procedure should be the obedient handmaiden and not the arrogant mistress of substantive law. Some of our provinces have made greater strides than others in their emancipation from rigid and technical forms of practice, and nothing but good would result from an attempt to assimilate the different systems.

The subjects which I have selected for your consideration do not by any means exhaust the list of those which might be

suggested. They are merely given by way of illustration, and my purpose has been attained if I have succeeded in convincing you of the possibility and desirability of nationalizing our jurisprudence.

You will not fail to bear in mind that the method suggested for realizing this object has nothing compulsory about it. It is founded upon the firm belief that persuasion is more potent than force in welding together communities. Much as we resent being dragooned into uniformity, we can hardly be so unreasonable as to refuse to give an attentive and sympathetic hearing to those who think that there is a great deal of good that we can learn from one another—much to borrow from every system and a great deal to discard in all.

It has indeed been contended by some writers that variety is desirable in a confederation, because it enables the component states to indulge in experiments which may prove instructive and useful to the whole country. The experience of the American Commonwealth is that in the field of law there has been too much experimentation at the expense of the litigant, and that so far from tending to the selection of the fittest among the tentative projects, the result has been to intensify defects and perpetuate unnecessary differences. The same problem faces us in Canada. Shall we by remaining in jealous isolation encourage the aimless and inevitable differentiation of our legal systems, or shall we not rather, in so far as our special circumstances will permit, fall into line with the movement in all great nations towards the goal which a great Belgian jurist called "the universality of the law."

REPORT OF PROCEEDINGS

AT THE

*FIRST ANNUAL MEETING, HELD AT MONTREAL MARCH 19, 20,
1915.*

FRIDAY, MARCH 19.

Morning Session.—The Association met at 10.30 a.m. at the Ritz-Carleton Hotel.

Mr. R. C. Smith introduced the Hon. C. S. Archibald, Chief Justice of the Superior Court, who addressed the Association.

After addresses of welcome to several distinguished visitors, the President, Sir James Aikins, K.C., M.P., delivered his address as President of the Association. This address appears in another place (ante p. 161).

The Hon. Arthur Meighen, Solicitor-General for Canada, then delivered an address on the "Parole System in Canada."

The reading of the minutes of the last meeting was dispensed with and the consideration of the annual reports of the Council and of the Treasurer were deferred.

The following amendments to the Constitution were then adopted:—

Article III. was amended by substituting twelve members (of the council) from the Provinces of Ontario and Quebec, instead of eight, and six members from each of the other Provinces, instead of four.

Article III. was also amended by adding the following sub-clause:—

"The members of the Council from each Province may appoint a local secretary, or local secretaries, and a local treasurer, who, with such members, shall form a Committee in such Province to further the interests of the Association therein."

And also by striking out the words "the same person shall not be elected President two years in succession."

Article VII. was amended by making the annual fee \$2 instead of \$5.

Afternoon Session.—Mr. Eugene Lafleur, K.C., delivered an address on the "Uniformity of Laws in Canada" which will be found in another place (ante p. 188).

Mr. John S. Ewart, K.C., then delivered an address on "Federations and Confederations."

At the Evening Session the President introduced Hon. James M. Beck, of the New York Bar, who was selected to deliver the principal address of the meeting. He gave a most eloquent and interesting address on "The Lawyer and Social Progress," which, if space permits, will be printed in a future issue.

SATURDAY, MARCH 20.

Morning Session.—The annual report of the Council of the Association was read and adopted.

Communications from the Law Societies of Alberta, Saskatchewan and Ontario were referred to the Council for consideration and action.

Article III. of the Constitution was amended by striking out the words "an associate-secretary" and substituting the words "two associate-secretaries."

Article III. was amended by adding the following clause: "The Council may employ and pay a secretary, such paid secretary, when so appointed, shall be ex-officio a member of the Council."

A further article was added to the Constitution as follows:—

"All Judges and retired Judges of any Supreme or Superior Court in Canada may, on application, become members of a Section of the Association to be known as the 'Judicial Section'; without the payment of annual dues, and such members of the Judicial Section shall be entitled to the privileges of the floor during meetings of the Association, but shall not be entitled to vote; and the Council may pass a by-law governing and regulating such Judicial Section."

The Treasurer's report was read and adopted.

The election of officers was then proceeded with, and the following were declared elected:—

HONORARY PRESIDENT:—The Minister of Justice.

PRESIDENT:—Sir James Aikins, K.C., Winnipeg.

VICE-PRESIDENTS:—Robert C. Smith, B.C.L., K.C., Montreal; E. F. B. Johnston, K.C., Toronto; M. G. Teed, K.C., St. John; Hector McInnes, K.C., Halifax; A. A. McLean, K.C., M.P., Charlottetown; Isaac Campbell, K.C., Winnipeg; Norman MacKenzie, K.C., Regina; R. B. Bennett, K.C., Calgary; G. E. Corbould, K.C., New Westminster.

SECRETARY:—E. Fabre Surveyer, K.C., Montreal.

ASSOCIATE SECRETARIES:—R. W. Craig, Winnipeg; W. J. McWhinney, K.C., Toronto.

TREASURER:—John F. Orde, K.C., Ottawa.

COUNCIL: *Quebec.*—P. B. Mignault, K.C., J. E. Martin, K.C., E. Lafleur, K.C., G. Desaulniers, K.C., A. W. Atwater, K.C., F. E. Meredith, K.C., Pierre Beullac, K.C., Montreal; G. G. Stuart, K.C., A. Rivard, K.C., L. St. Laurent, Quebec; C. W. Cate, K.C., Sherbrooke; J. E. Perrault, K.C., Arthabaska.

Ontario.—George F. Shepley, K.C., W. D. McPherson, K.C., M. H. Ludwig, K.C., H. H. Dewart, K.C., C. A. Moss, Toronto; Sir George Gibbons, K.C., London; W. F. Nickle, K.C., Kingston; J. E. Farewell, K.C., Whitby; W. R. White, K.C., Pembroke; Frank M. Field, K.C., Cobourg; John J. Drew, K.C., Guelph; W. F. Langworthy, K.C., Port Arthur.

Prince Edward Island.—A. B. Warburton, K.C., A. A. McDonald, K. J. Martin, K.C., G. C. Duffy, D. A. McKinnon, K.C., W. E. Bentley, Charlottetown.

Novia Scotia.—Robert E. Harris, K.C., J. A. Chisholm, K.C., Halifax; E. M. Macdonald, K.C., Pietou; J. A. Gillies, K.C., Sydney; D. D. McKenzie, K.C., North Sydney; E. N. Rhodes, Amherst.

New Brunswick.—Hon. George J. Clarke, K.C., Fredericton; Fred R. Taylor, K.C., J. D. P. Lewin, St. John; A. J. Gregory, K.C., A. R. Slipp, K.C., T. Carleton Allen, K.C., D.C.L., Fredericton.

Manitoba.—Isaac Pitblado, K.C., A. B. Hudson, K.C., C. P. Wilson, K.C., H. W. Whitla, K.C., Theo. A. Hunt, K.C., J. B. Coyne, Winnipeg.

Saskatchewan.—W. M. Martin, Regina; W. B. Willoughby, K.C., Moose Jaw; P. E. Mackenzie, K.C., Saskatoon; O. S. Black, K.C., Weyburn; J. A. M. Patrick, K.C., Yorkton; Donald Keith, North Battleford.

Alberta.—James Muir, K.C., A. H. Clarke, K.C., Calgary; O. M. Biggar, K.C., C. F. Newell, K.C., Edmonton; W. A. Begg, K.C., Medicine Hat; C. P. F. Conybeare, K.C., D.C.L., Lethbridge.

British Columbia.—E. P. Davis, K.C., L. G. McPhillips, K.C., E. A. Lucas, Vancouver; W. J. Taylor, K.C., E. V. Bodwell, K.C., Victoria; C. R. Hamilton, K.C., Nelson.

Mr. E. F. B. Johnston, K.C., then delivered an address on the "Honour of the Profession." This address appears in full in another place (ante p. 178).

At the request of the chair, Hon. J. B. M. Baxter, Attorney-General of New Brunswick, addressed the Association.

On motion, the Council was requested to arrange for the publication of the speeches and addresses delivered at the meeting of the Association, in order that they may be available for members of the profession.

On motion, the Council was requested to suggest to the various official Law Societies that instruction in legal ethics be given in the Law Schools of the Dominion.

At 4 P.M. the members of the Association were hospitably entertained by the Bar of Montreal at a reception at the University Club.

The annual Banquet of the Association was held at the Ritz-Carlton Hotel on Saturday evening, the President of the Association being Toast-Master.

The toasts were "The King" and "Our Profession." The latter was proposed by the Hon. C. J. Doherty, Minister of Justice, and was responded to by Mr. Henry D. Estabrook, of New York, Sir Horace Archambault, Chief Justice of Quebec, and Hon. Mr. Justice Duff of the Supreme Court of Canada.

Mr. E. F. B. Johnston, K.C., moved that His Royal Highness the Governor-General of Canada be asked to accept Honorary membership in the Association.

Mr. Robert C. Smith, K.C., was called upon by the President to propose the names of the Hon. James M. Beck and Mr. Henry D. Estabrook for Honorary Membership. This being unanimously agreed to, these gentlemen acknowledged the compliment in brief and eloquent terms.

ONTARIO BAR ASSOCIATION.

A delegation from this Association were some of the guests of the Lawyers Club of Buffalo on the 10th instant at a reception and a banquet. The reception was given to His Excellency, the Honourable Charles S. Whitman, Governor of the State of New York; the occasion being connected with the Convention about to be held in Albany, N.Y., for the consideration of proposed changes in the constitution of the State of New York. The invited guests to the banquet on that evening were the Governor and members of the convention, Sir George C. Gibbons, K.C., Honorary-President of the Ontario Bar Association and members thereof, Sir James Aikins, K.C., President of the Dominion Bar Association; Mr. Justice W. R. Riddell, the Mayor of Toronto, and others.

After the reception the Club entertained those of their guests who were able to attend at the banquet, in the Genesee House, at which were present also a large number of the Bar of Buffalo and surrounding cities, in all about two hundred.

The speaker of the evening was Dr. J. G. Schurman, President of Cornell University, who, by the way, is a native of Prince Edward Island. This eminent educationist delivered an eloquent and instructive address on subjects which are coming before the Convention, of which he is a prominent member. He referred amongst other things to the mode of appointing judges and other matters, in which we in this country, as well as our brethren in the United States, are interested. He hinted at possible changes in the direction of the practice existing in England and in this country. Other addresses were delivered by the Governor and other well-known members of the Bar of New York State.

The delegates present from the Ontario Bar Association were Sir George Gibbons, K.C., Honorary President; W. J. McWhinney, K.C., President; and R. J. MacLennan, Secretary of the Ontario Bar Association; also Henry O'Brien, K.C., H. H. Dewart, K.C., W. C. Mikel, K.C., A. Munro Grier, K.C., J.

A. McAndrew, K.C., A. Courtenay Kingstone, and R. H. Greer. Mr. Justice Riddell was also present and spoke in his usual happy style.

The banquet was a brilliant affair and a great success. Our neighbours to the south of us are princes of hospitality and good fellowship; and the interchange of courtesies between their profession and our own has been both pleasant and profitable.

LAW AS TO FALSE FLAGS.

The statement of a Press Association special correspondent at Scarborough that a spectator had asserted that he saw that the attacking German ships which bombarded that town had hoisted the British ensign would, if verified, be a grave breach of international law if the British ensign remained hoisted after the bombardment had begun. At sea, as on land, the use of false colours in war is forbidden. When a vessel is summoned to lie to, or before a gun is fired in action, the national colours should be displayed. It is, however, lawful to use false colours as a ruse, as Nelson did when he lay off Barcelona for a long time shewing the French flag, with the object of drawing out the ships of Spain, then allied with France. When such preliminaries are over and the combat actually begins the national colours should be hoisted. Professor Oppenheim thus expounds the doctrine with respect to the use of a false flag at sea, which is analogous to the use of a false flag in land warfare, for the purpose of stratagem as distinguished from deceit: "As regards the use of a false flag, it is by most publicists considered perfectly lawful for a man-of-war to use a neutral's or the enemy's flag. On the other hand, it is universally agreed that immediately before an attack a vessel must fly her national flag, since the principle is considered inviolable that during actual fighting belligerent forces ought to be certain who is friend and who is foe. British practice permits the use of false colours, but the United States Naval War Code forbids it altogether; whereas as late as 1898, during the war with Spain in consequence of the Cuban insurrection, two American men-of-war made use of the Spanish flag, and during the war between Turkey and Russia in 1877, Russian men-of-war in the Black Sea made use of the Italian flag."—*Law Times*.

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No. 6

MARRIAGE AND DIVORCE IN CANADA.*

PART I.

1. INTRODUCTION.
2. JURISDICTION, DOMINION AND PROVINCIAL.
3. DOMINION LEGISLATION.
4. SOURCES OF THE PROVINCIAL LAWS.
 - (1) *British Columbia.*
 - (2) *North West Territories, Alberta, Saskatchewan and Manitoba.*
 - (3) *Ontario.*
 - (4) *Quebec.*
 - (5) *The Maritime Provinces.*

PART II.

1. CAPACITY FOR MARRIAGE.
2. CIRCUMSTANCES RENDERING THE MARRIAGE VOID.
 - (1) *The legal age of marriage.*
 - (2) *Insanity.*
 - (3) *Existing previous marriage.*
3. CIRCUMSTANCES RENDERING THE MARRIAGE VOIDABLE.
 - (1) *Impotence.*
 - (2) *Consent—Error, fraud, or duress.*
 - (3) *Relationship within prohibited degrees.*
 - (4) *Spiritual or official positions.*
 - (5) *Difference of religion.*
 - (6) *Marriage of minors—Consent of parents.*
 - (7) *Communicable diseases or feeble-mindedness.*

* The scope of this article, prepared by Fraser Raney, M.A., LL.B., Barrister, with an introduction by W. E. Raney, K.C., appears by the following summary. Part I. appeared in the first issue; parts II and III were given in issue of April 1, and the remainder appears in this number.

PART III.

1. THE MARRIAGE CEREMONY.

- (1) *The three main classes of marriage ceremonies.*
- (2) *Who may solemnise marriage.*
- (3) *Authorisation of marriage—Banns or license.*
- (4) *Time, place and witnesses.*

2. REGISTRATION OF MARRIAGES.

PART IV.

1. DIVORCE TRIBUNALS AND THE GROUNDS UPON WHICH DIVORCE
IS GRANTED.

2. DIVORCE BY ACT OF PARLIAMENT.

3. DIVORCE BY PROVINCIAL COURTS.

4. PROCEDURE.

5. FOREIGN MARRIAGES.

6. DISSOLUTION OF MARRIAGE.

- (1) *By Canadian Divorce Courts.*
- (2) *By Courts of a foreign country.*

PART V.

1. RIGHTS AND OBLIGATIONS OF PARENTS AND CHILDREN.

- (1) *General statement.*
- (2) *Adoption.*
- (3) *Children of divorcees.*
- (4) *Children born out of wedlock.*

PART IV.1. DIVORCE TRIBUNALS AND THE GROUNDS UPON WHICH DIVORCE
IS GRANTED.

Divorce in its widest meaning includes both a total dissolution of the marriage bond and a partial suspension of the marriage relation. The former, or divorce *a vinculo matrimonii*, is the popular meaning of the word. The latter, or divorce *a mensa et thoro*, is usually called judicial separation. The word divorce will here be used in the first-mentioned sense alone.

There is a fundamental difference between divorce and a

proceeding for a declaration of the invalidity of the marriage contract. The first assumes what the second denies, namely, the existence of the marriage status. The distinction is especially important in the Province of Quebec, and from the point of view of the Roman Catholic Church, which sets its face steadily against divorce, but tolerates and is sometimes said to encourage proceedings for a judicial declaration. Thus the Church has frequently countenanced suits to annul marriage where, the parties or one of them being a Roman Catholic, the ceremony was not performed by a priest of the Roman Church.

As a general rule, throughout the Dominion, the Court or tribunal which has authority to decide questions relating to divorce has also jurisdiction to declare a marriage to be null—and no other. Notwithstanding its undoubted power to declare a marriage to be void, the Dominion Parliament discourages applications of this nature, and has only exercised its authority in this respect on two or three occasions.

In England, prior to 1858, Parliamentary divorce was the only available method of obtaining the dissolution of the marriage bond. The Ecclesiastical Courts could only give relief by separation. To bring divorce within the reach of others than the wealthy classes, a Court of Divorce and Matrimonial Causes was established in 1858. Later, by the Judicature Act, the jurisdiction of this Court was vested in the High Court of Justice, and administered by the Probate and Divorce Division. The jurisdiction of this Court includes (1) the dissolution of marriage, (2) the right to decide upon the nullity of marriage, (3) judicial separation, (4) the restitution of conjugal rights, (5) alimony, and (6) the custody of children.⁷¹

According to the statute law of England, a divorce can be granted for (1) the adultery of the wife, or (2), in the case of the husband, incestuous adultery, bigamy with adultery, rape, adultery with cruelty, or cruelty accompanied by desertion. A decree of nullity may be pronounced for (1) impotence, (2) the

71. Imperial Statutes, 20 & 21 Vict. ch. 85, sec. 6; 36 & 37 Vict. ch. 66, sec. 31.

breach of a statute directing certain forms of marriage, (3) bigamy. Judicial separation will be granted for adultery, unnatural practices, cruelty, or desertion for two years and upwards. This is the law which is applicable in British Columbia, and possibly in the Prairie Provinces and the North-West Territories.

2. DIVORCE BY ACT OF PARLIAMENT.

Parliamentary divorce, or divorce by private Act of the Dominion Parliament, is the only form of divorce available for citizens of Ontario and Quebec, and in practice for Alberta, Saskatchewan, Manitoba, and the North-West Territories. Bills of divorce were formerly granted by the Dominion Parliament upon the same evidence and for the same causes as are required by the Courts in England having jurisdiction in matrimonial causes. The practice of the Senate, however, has relaxed the requirements imposed by the English statute upon wives applying for divorce. Adultery of the husband is held sufficient grounds for relief without the additional requirements laid down by the English statute. On the other hand, the Senate will not grant divorce for any less cause than adultery, and has not encouraged applications for nullifying marriages or for judicial separation.

3. DIVORCE BY PROVINCIAL COURTS.

(1) *Nova Scotia*.—The Court for Divorce and Matrimonial Causes has power to declare any marriage null and void for impotence, adultery, cruelty, or marriage with kindred within the prohibited degree. The Court, on dissolving the marriage, may order the husband to pay alimony. Its powers as to maintenance of children are the same as those of the English Court. It has, moreover, by statute, all the powers of the English Divorce Court.

(2) *New Brunswick*.—The Court of Divorce and Matrimonial Causes, as established by provincial statute of 1860, has power to dissolve marriage on the ground of impotence, adultery, or marriage with kindred within the prohibited degrees, provided that in case of adultery the issue of such marriage shall not in any way be prejudiced, and provided that, unless decreed to the

contrary, the wife shall not be barred of dower, nor the husband of tenancy by the curtesy.⁷²

(3) *Prince Edward Island*.—A Court for hearing all suits concerning marriage and divorce was established in 1835, with power to dissolve marriage on the ground of impotence, adultery, or consanguinity within the prohibited degrees. Such a decree of divorce does not render the issue illegitimate, nor does it bar dower or curtesy unless expressly so adjudged.⁷³ It is noteworthy that no divorce has been granted by a Prince Edward Island Court since Confederation, nor was there any for many years prior thereto.

(4) *British Columbia*.—Under the Ordinance of 1867,⁷⁴ the Supreme Court of British Columbia was given jurisdiction to give the relief and exercise the powers conferred by the Imperial Act of 1858. By this Act judicial separation may be granted to either party on the ground of adultery, cruelty, or desertion without cause for two years and upwards, but divorce may only be granted on the ground of adultery.

(5) *Ontario* has no Divorce Court and no Court having jurisdiction to annul a marriage, except possibly for want of consent of parents under the Act of 1907 already referred to, but the constitutionality of which is doubtful. Alimony is in the jurisdiction of the Supreme Court of the Province.

(6) *Manitoba, Alberta, Saskatchewan, and the North-West Territory* have, as already stated, no legislation on the subject of divorce, and no Divorce Courts. It has not been judicially determined whether the Supreme Courts of these Provinces have jurisdiction over marriage and divorce.

(7) *Quebec* has no Divorce Court.

4. PROCEDURE.

Divorce procedure in the various provincial Divorce Courts follows closely the procedure of the English Divorce Court.

72. Revised Statutes of New Brunswick (1903) ch. 115.

73. Statutes of Prince Edward Island (1835), 5 Wm. IV. ch. 10.

74. Embodied in Revised Statutes of British Columbia (1911) ch. 75; and see *Watts v. Watts* (1908) Appeal Cases, p. 573.

The procedure with regard to parliamentary divorce is exceptional, and deserves special mention. Generally speaking, the rules or orders of the Senate govern, but if there is no rule applicable then recourse will be had to the rules governing the conduct of the English House of Lords sitting as a Court of Appeal. The Senate sits as a quasi-judicial and legislative body, and is not bound by any body of law or precedents. Divorce bills originate in the Senate by usage only; they could also originate in the House of Commons.

Proceedings to obtain a parliamentary divorce are commenced by petition to the Governor-General, Senate, and House of Commons. This petition, which becomes the preamble of the bill for divorce, must state the facts relied upon to obtain relief. The petition is deposited with the Senate not less than eight days before the opening of Parliament, together with a fee of \$200 and a sufficient additional sum to cover the cost of printing the bill. Six months' notice of the application for divorce is required, the publication to be in the *Canada Gazette* and in two newspapers where the respondent resides. There must also be proof of service of a copy of the *Gazette* on the respondent.

A typical bill of divorce consists of a preamble and three enacting clauses, the first dissolving the marriage, the second allowing the petitioner to marry again, and the third giving the issue of the second marriage the same rights as if the first marriage had never been solemnized. On the second reading, the rule requires that the petitioner attend before the Senate to give evidence. This rule is, however, in practice, suspended, and the evidence is taken by a select committee of nine senators. The ordinary rules of evidence are followed in proceedings before this committee. If a witness fails to attend, he may be taken into custody by the Usher of the Black Rod. If the evidence is sufficient, the bill is read a third time, passed, and is sent to the House of Commons, where it goes through the ordinary procedure of a private bill, and may, of course, be rejected. Until 1879 these bills were reserved for her Majesty's pleasure, but since then that practice has been discontinued.

Collusion or connivance between the petitioner and the re-

spondent will prevent the petitioner obtaining relief. If the wife has no means to defend the action, the husband will be required to advance a proper sum for this purpose.

The ground for seeking divorce was adultery in every case, additional reasons being alleged in some of the cases.

The following table indicates how the divorces granted at Ottawa for eight years, ending with 1914, were distributed, by Provinces:—

| | 1907. | 1908. | 1909. | 1910. | 1911. | 1912. | 1913. | 1914. | Total for 8 Years. |
|---------------|-------|-------|-------|-------|-------|-------|-------|-------|-----------------------|
| Ontario..... | 3 | 8 | 8 | 14 | 12 | 9 | 21 | 18 | 93 |
| Quebec..... | 1 | 0 | 3 | 2 | 5 | 3 | 4 | 7 | 25 |
| Manitoba..... | 1 | 0 | 2 | 2 | 3 | 1 | 5 | 2 | 16 |
| Saskatchewan. | 0 | 0 | 1 | 2 | 0 | 1 | 1 | 2 | 7 |
| Alberta..... | 0 | 0 | 1 | 0 | 2 | 2 | 4 | 4 | 13 |
| P.E.I..... | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 1 |

5. FOREIGN MARRIAGE.

The question of the validity of a foreign marriage or divorce may arise, either directly in the provincial Courts in Canada which have jurisdiction to annul marriages, or collaterally in the ordinary Courts of civil or criminal jurisdiction, as, for instance, on a question of inheritance or title to real property or on a charge of bigamy. Whenever such a question arises, whether directly or collaterally, the domicile of the parties at the time of the marriage or divorce, as the case may be, is likely to be an important question. Upon the decision of this question of domicile will depend, in the case of a marriage, the body of law which is to

NOTE.—Table of divorces granted by the Dominion Parliament since Confederation:—

| | | | | | |
|------------|---|------|---|------|----|
| 1868 | 1 | 1890 | 2 | 1903 | 7 |
| 1869 | 1 | 1891 | 4 | 1904 | 6 |
| 1873 | 1 | 1892 | 5 | 1905 | 9 |
| 1875 | 1 | 1893 | 7 | 1906 | 14 |
| 1877 | 3 | 1894 | 6 | 1907 | 5 |
| 1878 | 3 | 1895 | 3 | 1908 | 8 |
| 1879 | 1 | 1896 | 1 | 1909 | 16 |
| 1884 | 1 | 1897 | 1 | 1910 | 19 |
| 1885 | 5 | 1898 | 3 | 1911 | 22 |
| 1886 | 1 | 1899 | 4 | 1912 | 14 |
| 1887 | 5 | 1900 | 5 | 1913 | 35 |
| 1888 | 3 | 1901 | 2 | 1914 | 33 |
| 1889 | 4 | 1902 | 2 | | |
| Total..... | | | | 263 | |

determine the property rights of the parties,⁷⁵ and in the case of an alleged divorce the validity of the decree.

Domicile being thus important, it is desirable to have a clear understanding of the meaning of the word.

In a leading case Lord Westbury describes domicile as "A conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed, not for a limited period or particular purpose, but general and indefinite in its future contemplation."⁷⁶

The domicile of a married woman is the same as and changes with every change of the domicile of her husband, even though she resides apart from him, except for the purpose of procuring divorce.⁷⁷

The validity of a foreign marriage is decided by Canadian Courts according to the law of England—which on this subject is also the law of Canada. A foreign marriage is valid when—

1. Each of the parties has, according to the law of his or her respective domicile, the *capacity* to marry the other, and

2. Either of the following conditions as to the *form* of celebration is complied with: (a) The marriage is celebrated in accordance with the local form; or (b) the marriage is celebrated in accordance with the requirements of the English common law in a country where the use of the local form is impossible.⁷⁸

6. DISSOLUTION OF MARRIAGE.

(1) Canadian Divorce Courts have no jurisdiction to entertain proceedings for the dissolution of the marriage of parties not

75. *De Nichols v. Curlier* (1900) Appeal Cases, p. 21.

76. *Udney v. Udney* (1869) Law Reports, House of Lords (Scotch), p. 441.

77. *Harvey v. Farnie* (1882) 8 Appeal Cases, p. 43, at pp. 50 & 51; *Dolphen v. Robins* (1859) 7 House of Lords Reports, p. 390.

78. *The King v. Brampton* (1808) 10 East's Reports, p. 282.

domiciled within their respective Provinces at the commencement of the proceedings,⁷⁹ except where a husband domiciled in the Province deserts his wife and removes from the Province, and she continues to live in the Province. In such a case the Court may on petition grant her a divorce.⁸⁰ On the other a Canadian Divorce Court has jurisdiction to entertain a suit to declare a marriage to be null and void if it was celebrated within its jurisdiction. It may also entertain a suit for judicial separation or for the restitution of conjugal rights when both the parties thereto are at the commencement of the suit resident within its jurisdiction although this residence may not amount to domicile.⁸¹

(2) With regard to the dissolution of a Canadian marriage by the Courts of a foreign country, the law is that the Courts of such a foreign country have jurisdiction to dissolve the marriage of persons domiciled there in good faith at the commencement of the proceedings for divorce. This rule applies alike to Canadian and to foreign marriages.⁸² A foreign divorce, therefore, if pronounced by a competent Court of a country where the parties to a marriage performed in Canada were (in good faith) domiciled at the time of the divorce proceedings, will dissolve such marriage and be held valid in Canada.⁸³ This rule is equally applicable to foreign divorces granted for causes not recognized in Canada, if proper domicile is established.⁸⁴

In the *Ash Case* (1887) it was stated that under no circumstances would the Canadian Parliament recognize a divorce granted by a United States Court in a case where the parties were married in Canada.⁸⁵ But the evidence in the *Ash Case* did not establish a *bonâ fide* domicile within the jurisdiction of the Court which granted the divorce, and this broad statement was therefore

79. Prof. A. V. Dicey, "The Conflict of Laws" (1908), 2nd ed., at p. 256.

80. *Armylage v. Armylage* (1898) Probate Reports, p. 178.

81. Dicey, *supra*, at p. 265.

82. Dicey, *supra*, at p. 381.

83. *Scott v. The Attorney-General* (1886) 11 Probate Division Reports, p. 128.

84. *Harvey v. Farnie* (1882) 8 Appeal Cases, p. 43.

85. See Gemmill, "Practice of the Senate as to Divorce" (1889), at p. 27.

unnecessary to the decision of the case. At all events, and whatever the Parliament of Canada might do there is no doubt that Canadian Courts of justice will recognize a foreign decree of divorce if regularly granted by a Court of competent jurisdiction.

PART V.

RIGHTS AND OBLIGATIONS OF PARENTS AND CHILDREN.

(1) *General Statement.*—By the common law of England the father has the right to the custody of his infant children as against third parties, and even as against the mother and though the child be an infant at the breast. The ante-nuptial contract of a father to give over the control of the children of the intended marriage to their mother is deemed to be against public policy, and will not be enforced by the Courts, although upon separation such an agreement is perfectly valid. During the lifetime of the father a mother has at common law no legal authority; but on the death of the father, without having appointed a guardian, she is entitled to the custody of her infant children. Where the father has by will appointed a guardian, the mother has, by the common law, no right to interfere with him.

At common law the control of the parent (father or mother) lasts, under ordinary circumstances, until, and in all cases ends, when the child attains the age of twenty-one or marries under that age. Parents cannot at common law enter into legally binding agreements to deprive themselves of the custody and control of their children. If, however, as a matter of fact, parents do put their children into the control of others, they will not be permitted, at the hazard of injuring the children, to take them back into their own custody. The interest of the children is the sole guide to the Court in such a case.⁸⁶

The obligation to maintain children is enforced by the Criminal Code. "Everyone who, as parent or guardian or head of a family, is under a legal duty to provide necessaries for any child under the age of sixteen years, is criminally responsible for omit-

86. Eversley, "Domestic Relations," 2nd ed., at p. 493 *et seq.*

ting, without lawful excuse, to do so while such child remains a member of his or her household, whether such child is helpless or not, if the death of such child is caused, or if his life is endangered, or his health is, or is likely to be, permanently injured by such omission."⁸⁷ An amendment passed in 1913⁸⁸ provides that if a parent so neglects his children, when destitute or in necessitous circumstances, he shall be liable to a fine of \$500 or to one year's imprisonment or to both. It is also an indictable offence, punishable by three years' imprisonment, to abandon any child under the age of two years whereby its life is endangered or its health is permanently injured.⁸⁹

At common law a parent is not liable for necessities supplied to his children apart from agreement, express or implied. The same is true of the support of a parent by his child.

The common law of England, as above outlined, is in force in Canada unless changed by the statutes of the various Provinces. The changes which have been made are, however, important. Thus, in Ontario the Supreme Court or the Surrogate Court has general authority to make orders as to the custody of children and the right of access of either parent, having regard to the welfare of the children and to the conduct of the parents, and "to the wishes as well of the mother as of the father."⁹⁰

All the English-speaking Provinces and the Territories have very similar statutes. In the Yukon and the North-West Territories the Court may give the mother the custody of the child, but only if the child is under twelve years of age. In 1913, British Columbia enacted a provision similar to that of Ontario. Prior to that year the Court could only give the mother the custody of her child if the child was under the age of seven.⁹¹

87. Revised Statutes of Canada (1906) ch. 146, sec. 242.

88. Statutes of Canada, 3 & 4 Geo. V. ch. 13, sec. 14.

89. Revised Statutes of Canada (1906) ch. 146, sec. 245.

90. Revised Statutes of Ontario (1914) ch. 153, sec. 2, sub-sec. 1.

91. Statutes of British Columbia (1913) ch. 31, sec. 4, sub-sec. 9; Statutes of Alberta (1913) ch. 13, sec. 2; Statutes of Manitoba (1913) ch. 94, sec. 32; Revised Statutes of New Brunswick (1903) ch. 112, sec. 196; Revised Statutes of Nova Scotia (1900) ch. 121; Consolidated Ordinances of the Yukon (1902) sec. 582; Consolidated Ordinances of the Northwest Territories (1905) sec. 574.

(2) *Adoption*.—The only Province which has attempted comprehensive legislation dealing with adoption is Nova Scotia. The Nova Scotia statute provides that a child may be adopted by any person over twenty-one years of age upon petition to the Court and upon proving the consent of the child and its parents, or mother only if the child be illegitimate. The Court must be satisfied as to the petitioner's ability to maintain the child. Under this statute an adopted child has the same rights of succession in case of death of the guardian intestate that he would have if he were the legitimate child of the guardian. Alberta gives its Courts jurisdiction to sanction the adoption of infants, but goes no further.⁹²

(3) *Children of Divorcees*.—The jurisdiction of the English Divorce Court as to the custody of children is entirely statutory. The English Matrimonial Causes Act, 1857, gives the Court jurisdiction to provide for the custody, maintenance and education of the children of divorcees. Although the interests of the parents will be taken into consideration, the chief aim is to do what is best for the children. As a general rule the innocent party has a *prima facie* right to the custody of children after a final decree of divorce.

The British Columbia, New Brunswick, Nova Scotia and Prince Edward Island statutes dealing with divorce and matrimonial causes do not vary substantially from those of the English Act.⁹³

(4) *Children Born Out of Wedlock*.—According to the common law of England legitimacy is a status arising from the fact of birth within lawful wedlock or within a reasonable time after its dissolution.⁹⁴ Illegitimate children are, according to the strict interpretation of the common law, strangers, so far as the rights of the child are concerned, to those who have brought them into being. Statute law has qualified this by imposing

92. Revised Statutes of Nova Scotia (1900) ch. 122, as amended by Statute of Nova Scotia (1901) ch. 47; Statutes of Alberta (1913) ch. 13, sec. 27.

93. Revised Statutes of British Columbia (1913) ch. 67, sec. 20; Revised Statutes of Nova Scotia, 3rd Series, ch. 126.

94. Eversley, *supra*, at p. 475.

obligations for their support and maintenance upon their parents. Upon legitimacy depend the child's right of inheritance, of bearing the father's name, of kinship and of family ties, and the right to be maintained, educated and protected. At common law the mother has the primary right to the custody of an illegitimate child. The liability of the putative father to maintain his illegitimate child is statutory.

Two outstanding methods of providing for the maintenance of illegitimate children have been adopted by provincial statutes. Ontario permits any person furnishing clothing, lodging or other necessities to a child born out of wedlock and not living with its reputed father to recover against him for the same. Where the mother sues, corroborative evidence that the defendant is the father of the child is necessary. In either case, in order to maintain an action, an affidavit of affiliation must be made voluntarily by the mother and deposited with the clerk of the peace of the county or city in which she resides, either while she is pregnant or within six months after the birth of the child. British Columbia and the North-West Territories have similar statutes.⁹⁵

The Nova Scotia law may be taken as typical of the second method of dealing with the subject. The Nova Scotia Act is divided into two parts. The first deals with proceedings which may be taken to indemnify the municipality against payment for the support of illegitimate children. At the instance of the mother, or of a ratepayer, an information is sworn out alleging that a certain man is the child's father. If the man admits the charge he is required to give a bond for \$150 for the mother's medical expenses and the child's future maintenance. If he does not admit the charge he and the mother are brought before the County Judge. Evidence is taken, and if the charge is established a lump sum in payment of expenses may be assessed, not to be less than \$80 or more than \$150.

A putative father is rendered liable, by the second part of the Act, for the medical attendance and care of the mother for three

95. Revised Statutes of Ontario (1914) ch. 154; Revised Statutes of British Columbia (1911) ch. 107; Consolidated Ordinances of the North-west Territories (1905), including Statute of 1903, ch. 29, secs. 1-3.

months after the child's birth, and for the child's maintenance and education until it is fifteen years of age. Action may be brought as for a debt, but no order for future maintenance will be granted awarding more than \$1 per week. The weekly payment of maintenance may be enforced by execution.

New Brunswick, Manitoba and Saskatchewan have statutes similar to that of Nova Scotia.

In New Brunswick the consent of one of the overseers of the parish is necessary before a warrant for the arrest of the father can be issued. The limit of the allowance for maintenance in New Brunswick is 70 cents per week until the child is seven years old. In Saskatchewan the Judge may order a payment for maintenance, education and expenses of birth not to exceed \$5 per week, until the child reaches the age of thirteen. Saskatchewan also requires that an affidavit of affiliation be filed before action can be brought for necessities supplied to an illegitimate child.⁹⁶

The law of Quebec as to parent and child, being fundamentally different from the law of the English-speaking Provinces, is treated separately.

A child remains subject to parental authority until his majority, that is to say, until he is twenty-one years of age, or until his emancipation, but the father alone exercises this authority during his lifetime.⁹⁷ A father is by law entitled to the custody and guardianship of his children, and cannot be deprived of his minor child, except for insanity or gross misconduct; nor can he deprive himself of his paternal right; and any contract to the contrary cannot bind him, as it is immoral in the eye of the law.⁹⁸ As a general rule, where a minor is brought before the Court by *habeas corpus*, if he be of an age to exercise a choice, the Court leaves him to elect as to the custody in which he will be.⁹⁹ The mother has an absolute right to the charge of a child until it is twelve

96. Revised Statutes of Nova Scotia (1900) ch. 51; Revised Statutes of New Brunswick (1903) ch. 182; Statutes of Saskatchewan (1912) ch. 39; Revised Statutes of Manitoba (1906) ch. 92.

97. Civil Code of Quebec, Arts. 243 & 246.

98. *Barlow v. Kennedy* (1871) 17 Lower Canada Jurist, p. 253.

99. *Regina v. Hull* (1877) 3 Quebec Law Reports, p. 136.

years old (the father being dead), unless it is established that she is disqualified by misconduct, or is unable to provide for the child.¹⁰⁰

An unemancipated minor cannot leave his father's house without his permission.¹⁰¹ Emancipation only modifies the condition of the minor; it does not put an end to the minority, nor does it confer all the rights resulting from majority. Every minor is of right emancipated by marriage.¹⁰² A tutor (or guardian) for an infant may be appointed by a competent Court on the advice of a family council. The family council must consist of at least seven near relations, who must be males over twenty-one years of age.¹⁰³

Quebec is the only Province in Canada where children born out of wedlock are legitimated by the subsequent marriage of their father and mother.¹⁰⁴ An illegitimate child has a right to establish judicially his claim of paternity or maternity, and, upon the forced or voluntary acknowledgment by his father or mother of him as their illegitimate child, he has the right to demand maintenance from each of them, according to their circumstances.¹⁰⁵

ATTEMPT TO COMMIT A CRIME.

The perplexing question of the meaning of "attempt to commit a crime" has once again claimed the attention of the Court of Criminal Appeal. It is sometimes supposed that the principle of the established definitions of "attempt" is clear, and that it is only its application, which must depend upon the circumstances of each individual case, that causes all the difficulty. It is doubtful, however, whether there is any very clear principle. Over and over again counsel cite the definition in Stephen: "An act done

100. *Ex parte Ham* (1883), 27 Lower Canada Jurist, p. 127.

101. Civil Code of Quebec, Art. 244.

102. *ib.* Arts. 247, 248 & 314.

103. *ib.* Arts. 249, 251 & 252.

104. *ib.* Art. 237.

105. *ib.* Arts. 240 & 241.

with intent to commit the crime and forming part of a series of acts which would constitute its actual commission if it were not interrupted." This definition was approved in *Rex v. Laitwood* (4 Crim. App. Rep. 248), and recently was again cited by the Crown. But obviously it tells us nothing. For assuming any series to be divisible into preparation, attempt, and accomplishment, the real difficulty is to determine exactly at what point in the series the interruption demarcates an attempt from mere preparation. Stephen's definition, as has been said before, would not prevent a conviction for forgery of one who purchased a bottle of ink and some paper.

The circumstances in *Rex v. Robinson*, the case before the Court of Criminal Appeal, were these: The appellant conceived a fraudulent scheme to make good his trade losses by first insuring at Lloyd's, and then pretending that robbers had broken into his premises, tied him up, and robbed him. A police officer, hearing his cries, broke in and found him partly tied up. The appellant had made no claim on the underwriters, and the police, dissatisfied with his story, had made a search and found the jewels alleged to have been stolen. The Court held that all this amounted to no more than preparation, and that there was no evidence of an attempt to obtain money by false pretences.

The Lord Chief Justice appears to have been pressed by the fact that the appellant had made no claim on the underwriters, and had taken no steps to communicate with them with the object of making a statement as to the "burglary"; and he alluded to the principle as stated by Baron Parke in *Re. v. Eagleton* (6 Cox C.C. 559)—viz., "acts remotely leading to the commission of the offence are not to be considered as attempts to commit it but acts immediately connected with it are." Neither this principle nor its application is clear. What is wanted is a test of the necessary degree of approximation towards commission. Mr. Justice Bray intimated in the recent case that the Crown was attempting to go further than in any previous case; but at least it can be said that the appellant had proceeded very much further than to commit a merely equivocal act or series of acts. The impress of his fraudulent intention was clearly stamped on

his acts. The fact that he had made no communication to Lloyd's, having been interrupted before he had reached the stage at which it would have been natural to make such communication, seems immaterial; for, had he gone as far as that, the crime would, it is submitted, have been practically complete. There would have remained nothing essential on his part to do, except, in the event of suspicion, to reiterate his claim. In every case, of course, if matters go no further than "preparation," there is still a *locus pœnitentiæ*.

But the difficulty is to say in any case when it is too late to repent, and there is no case that really affords a satisfactory principle. It has been suggested, on the analogy of the definition in the German Civil Code, that an attempt is the "commencement of the execution of a crime," or, in other words, forms a constituent part of the complete crime. Professor Salmond acutely suggests that the solution may be whether the act is itself evidence of the criminal intent with which it is done: "A criminal attempt bears criminal intent upon its face. *Res ipsa loquitur*." Mr. Justice Wightman goes very near this suggestion in *Roberts'* case (Dears. C.C. 539): "An act immediately connected with the commission of the offence, and in truth a person could have no other object than to commit the offence." But Professor Salmond's seems to be too severe and too objective a test. No Court has yet gone to the length of suggesting that the "attempt" should have criminality clearly and objectively stamped on its face. There is no doubt that the Court of Criminal Appeal were right in quashing the conviction in *Robinson's* case, because, even if the police officer had gone away satisfied with the appellant's story, the latter might still have hesitated to "fish in the swim so ingeniously baited by him."

But, applying Mr. Justice Wightman's principle, it is clear that the appellant could have had no other object than to defraud the underwriters, though, objectively regarded, his acts might, on the mere face of them, be susceptible of an innocent construction. A really satisfactory principle still remains to be enunciated.—*Law Times*.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

**RAILWAY—POWERS OF BOARD OF RAILWAY COMMISSIONERS—
ORDER AUTHORIZING BRIDGES—COST OF WORK—ORDER
AGAINST PROVINCIAL RAILWAY—ULTRA VIRES—RAILWAY
ACT (R.S.C. c. 37), ss. 59, 237, 238—B.N.A. ACT (30 VICT.
c. 3), s. 92 (10).**

British Columbia Electric Ry. v. Vancouver, Victoria and Eastern Ry. (1914) A.C. 1067. This was an appeal from the Supreme Court of Canada affirming an order of the Board of Railway Commissioners. This order had been made in the following circumstances. The city of Vancouver desired to alter the grade of four streets in the city which were crossed by the tracks of a railway under Dominion control, and on two of which streets a railway under provincial control operated a street railway, and the city applied to the Dominion Board of Railway Commissioners for authority to carry the streets over the Dominion railway tracks on bridges. The Board authorized the work to be done, and ordered that a part of the cost should be borne by the railway under provincial control, on the ground that that company would be benefited by the alteration. The Judicial Committee of the Privy Council (Lords Moulton, Parker, and Sumner, and Sir. Geo. Farewell) held, reversing the Supreme Court of Canada, that the Board of Railway Commissioners had no power in the circumstances to make such an order against the railway under provincial control. Their Lordships point out that the application was made by the city against the railway under Dominion control. No relief was asked as against the tramway company, which was notified merely that it might see that its rights were not interfered with, but that company was not asking any privilege, so that its presence did not give the Board any jurisdiction to make the order against it. Their Lordships held that the fundamental error of the Railway Commissioners was that they considered that the fact that the tramway company would be benefited by the works gave them jurisdiction to order them to pay part of the cost; but their Lordships say there is nothing in the Railway Act which gives any such jurisdiction.

PRINCIPAL AND AGENT—SALE OF GOODS—DEL CREDERE COMMISSION—NON-PERFORMANCE OF CONTRACT BY BUYER—SOLVENCY OF BUYER—LIABILITY OF BROKER.

Gabriel v. Churchill (1914) 3 K.B. 1272. This was an appeal from the decision of Pickford, J. (1914) 1 K.B. 449 (noted *ante* vol. 50, p. 261). It may be remembered that the point involved is the nature and extent of the liability of agents selling on a *del credere* commission. The buyers were perfectly solvent, but a dispute arose between them and the sellers as to the performance of the contract by the sellers, and the buyers refused to pay the balance claimed, whereupon the sellers brought the present action against the agents, claiming that in default of payment by the buyers the agents were liable as principals. Pickford, J., decided that the defendants were only liable for any ascertained debt due in respect of the goods sold on default of payment by the buyers, and that in the present case the debt had not yet been ascertained. The Court of Appeal (Buckley, Kennedy and Phillimore, L.JJ.) affirmed his decision.

CRIMINAL LAW—BRIBERY—CONSPIRACY—PUBLIC OFFICER—COLONEL OF REGIMENT ACCEPTING BRIBES FROM CATERERS FOR CANTEEN.

The King v. Whitaker (1914) 3 K.B. 1283 is a kind of case which happily does not often occur, it being a prosecution against a colonel of a regiment for accepting bribes from a mercantile firm competing for the custom of the regimental canteen. The accused was found guilty. The evidence shewed that he had received cheques from time to time for shewing favours to a mercantile firm who competed for the right to supply the regimental canteen of his own regiment, and also for recommending that firm to other regiments. The defendant appealed from the conviction, but the Court of Criminal Appeal (Lawrence, Lush and Atkin, JJ.) held that he had been rightly convicted; that the offence was a misdemeanour at common law for a ministerial public officer, which the defendant was held to be, to receive, or conspire with others that he should receive, bribes to influence him in the discharge of his public duty. The appeal was therefore dismissed.

VENDOR AND PURCHASER—BUILDING SCHEME—RESTRICTIVE COVENANT—CONSTRUCTION—POWER TO "VENDOR" TO VARY—SUBSEQUENT SALES SUBJECT TO STIPULATIONS IN ORIGINAL DEED—"VENDOR"—RELEASE OF STIPULATIONS BY ORIGINAL VENDOR.

Mayner v. Payne (1914) 2 Ch. 555. A somewhat novel point

of construction was involved in this case. Land, the subject of a building scheme, was sold to the plaintiff subject to a restrictive covenant as to building, but which covenant was subject to a proviso that the "vendor" might vary the stipulations. Part of the land sold to the plaintiff he re-sold to the defendant's predecessor in title, and the conveyances contained a schedule of the various stipulations in the conveyance from the original owner to the plaintiff, including the proviso that they might be altered by the "vendor." The plaintiff's vendor had for valuable consideration waived some of the stipulations in favour of the defendant, and the question was whether the "vendor" referred to in the restrictive covenant in the defendant's deed was the plaintiff or the plaintiff's vendor. Neville, J., held that on the true construction of the covenant the "vendor" who might vary the stipulations was the plaintiff's vendor and not the plaintiff himself.

COPYRIGHT—INFRINGEMENT OF COPYRIGHT—OFFER BEFORE ACTION TO DESIST FROM INFRINGEMENT—INJUNCTION—COSTS.

Savory v. World of Golf (1913) 2 Ch. 566. This was an action to restrain the infringement of the plaintiff's copyright. Before action the defendants offered to discontinue the infringement and pay damages which might be agreed on; the plaintiffs, nevertheless, instituted the action, and claimed an injunction. Neville, J., held that notwithstanding the offer to discontinue the infringement before action the plaintiffs had a right to an order of the Court restraining the infringement. But he held that if such an offer is made after action, accompanied by an offer to submit to an order and pay the costs to date, the plaintiffs may be deprived of any subsequent costs.

WILL—CONSTRUCTION—GIFT TO "MY COUSINS AND HALF COUSINS."

In re Chester, Servant v. Hills (1914) 2 Ch. 580. By the will in question in this case the testatrix left property in trust for "my cousins and half cousins," and the question presented for adjudication was, who were meant by the term "half cousins." Sargant, J., accepting the definition given in Murray's Dictionary, determined that "half cousins" meant "second cousins," and he rejected the suggestion that any local signification could be attached to the term. He therefore held that first cousins, first cousins once removed, and second cousins, took under the gift.

POWER OF APPOINTMENT—APPOINTMENT TO OBJECT OF POWER,
COUPLED WITH CONDITION THAT THE APPOINTOR SHOULD PAY
ANNUITIES TO PERSONS NOT OBJECTS—VALIDITY OF APPOINT-
MENT FREE FROM CONDITIONS.

In re Holland, Holland v. Clapton (1914) 2 Ch. 595. The validity of the exercise of a power of appointment was in question in this case. By the will of her father a lady had power by will or codicil to appoint the whole or any part of the income of a fund yielding about £600 or £700 per annum to her husband for life. By her will she appointed the whole fund to him for his absolute use, provided he should acquiesce in her testamentary dispositions and so long as he should pay to her three nieces £100 a year each, these nieces being also under the will some of the residuary legatees of the testatrix. It was contended that the whole appointment was bad, as being an attempt on the part of the appointor to benefit persons who were not objects of the power. But Sargant, J., was of the opinion that the testatrix had a genuine desire to benefit her husband, and that the appointment in his favour was good, but that the condition annexed was invalid.

RESTRAINT OF TRADE—COVENANT—REASONABLE PROTECTION OF
COVENANTEE — SEVERABILITY OF COVENANT — PROCURING
BREACH OF COVENANT—DAMAGES.

Goldsoll v. Goldman (1914) 2 Ch. 603. This was an action to restrain the breach of a covenant in restraint of trade. The facts were that Goldsoll had carried on a business in imitation jewellery in London under the name of Tecla, and Goldman was principally interested in a company named Terisa, which carried on a like business in the same neighbourhood. The Tecla business was also carried on in Paris, New York, Vienna, Berlin, and other cities. In June, 1912, Goldsoll and Goldman entered into an agreement for putting an end to competition between the Terisa business with the Tecla business, and Goldman agreed to discontinue the Terisa business and not allow the name Terisa to be used in a similar business for two years from October 22, 1912, and covenanted that he would not for the like period, "either solely or jointly, with or as agent or employee for any other person, persons or company, directly or indirectly carry on or be engaged, concerned or interested in, or render services gratuitously or otherwise, to the business of a dealer in real or imitation jewellery in the County of London or any part of the United Kingdom of Great Britain and Ireland and the Isle of Man, or in France, the United States, Russia, or Spain, or within

twenty-five miles of Potsd Jamerstrasse, Berlin, or St. Stefans Kirche, Vienna." Goldsoll had transferred his business to the Tecla Gem Co., and he and that company brought the action against Goldman and Sessel, a former manager of the Teresa Company, and S. Sessel & Co., a company under whose name Sessel and his wife had started a similar business to that of the plaintiffs in London, claiming an injunction against Goldman restraining breaches by him of his covenant, and restraining the other defendants from procuring and inducing such breaches. It appeared, as the Judge found, that the Sessel Co. had been promoted and assisted by Goldman, and that the business was really his. On the part of the defendants it was contended that the covenant was too wide in area, and extended to the dealing not only with imitation but also real jewellery, and was not necessary for the plaintiff's protection, and was therefore void. Neville, J., who tried the action, held that as regards the dealing in real jewellery the covenant was not too wide having regard to the nature of the plaintiff's business, and as regarded the question of area it was severable, and so far as it related to the United Kingdom and the Isle of Man it was not too wide, and he granted the injunction as to that area as prayed. With regard to damages, he held the evidence of damage to be of too general a character to enable him to estimate it properly, and he therefore gave only the nominal amount of £10 as against Sessel and Sessel & Co.

INSURANCE OF DEBENTURES—RE-INSURANCE—BANKRUPTCY OF INSURER—LIABILITY UNDER CONTRACT OF RE-INSURANCE.

In re Law Guarantee T. & A. Society, —Liverpool Mortgage Insurance Co.'s Case (1914) 2 Ch. 617. This was an appeal from the decision of Neville, J., (1913) 2 Ch. 604 (noted *ante* vol. 50, p. 61), the question in controversy being the measure of liability on a contract of re-insurance. The Law Guarantee T. & A. Society had guaranteed the payment of certain debentures. They re-insured two-elevenths of this risk with the Liverpool Mortgage Co. The Society became insolvent and went into liquidation, and a scheme was arranged whereby the claims of the debenture holders were compromised at 10s. in the pound. The liquidator claimed to recover the two-elevenths of the gross amount for which the Society was liable, and the Mortgage Co. contended, and Neville, J., so held, that it was only liable for two-elevenths of the amount payable under the arrangement made with the debenture holders. The Court of Appeal (Buckley, Kennedy and Scrutton, L.JJ.) dissent from that view. On behalf of the

Law Guarantee Society it was argued that if the Mortgage Co.'s contention were correct a person with no assets other than full re-insurance might be driven into bankruptcy and only be able to recover from the re-insurers the nominal dividend his assets would pay, although the very object of the re-insurance was to provide him with funds to meet his liability; and the Court of Appeal agreed that such is not the effect of a contract of re-insurance such as was in question in this case. It is not a contract of indemnity against what the insured are actually able to pay, but a contract insuring them against what they are liable to pay in respect of the risk insured against.

EASEMENT—RIGHT-OF-WAY—PRIVATE ROAD—FENCING RIGHT-OF-WAY—ACCESS BY GATES—OBSTRUCTION.

Pellety v. Parsons (1914) 2 Ch. 653. The exact facts of this case it would be difficult to explain without a diagram, but it may suffice here to state that the question involved was the right of access to a road over which the defendant had a right of way by grant from the plaintiff. At the time of the grant the way was unfenced. Subsequently the plaintiff fenced in the way, giving the defendant access by means of a gate, which gate and fence the defendant removed as being an obstruction of his right-of-way. Sargant, J., held that the defendant was justified in removing the fence and gate, but the Court of Appeal (Cozens-Hardy, M.R., and Eady and Pickford, L.JJ.) reversed his decision, holding that the defendant had no right to insist on the way remaining unfenced, and that what had been done by the plaintiff was not any infringement of the defendant's right over the way.

PRACTICE—FUND IN COURT—PAYMENT TO ONE TRUSTEE.

Leigh v. Pantin (1914) 2 Ch. 701. A fund in Court had been settled by a lady, on her marriage in 1890, in trust for herself for life, then for her husband for his life, and on the death of the survivor for the children of the marriage, and in default of children for the settlor absolutely. The only trustee of the settlement was the settlor's brother. In 1890 the husband deserted his wife and had not since been heard from, and there were no children of the marriage. The sole trustee and the wife now applied for payment out of Court of the fund to the trustee. The husband was not a party to the proceeding. After consideration, Sargant, J., came to the conclusion that although the general rule is that a fund in Court will not be ordered to be paid out to a sole trustee without the consent of all the beneficiaries, yet in the

circumstances of this case the order might be made, on the trustee undertaking to have another trustee appointed in case children of the marriage should be born.

LANDLORD AND TENANT—COVENANT FOR RENEWAL—CONSTRUCTION.

Wynn v. Conway (1914) 2 Ch. 705. In this action the construction of a covenant for renewal in a lease was in question. The lease was for twenty-one years, and the covenant in question provided that "at the expiration of the first eleven years of the term hereby granted, in case the lessee shall surrender or resign these presents and the term of twenty-one years hereby granted to the lessors, and upon such surrender as aforesaid, and paying to the lessors at the expiration of eleven years aforesaid, or upon the 29th day of September next after the determination of the said eleven years, £7 10s., for a fine for the said premises, then the lessors shall and will at the proper costs and charges of the lessee grant unto the lessee a new lease of the premises with the appurtenances for the like term of twenty-one years, to commence from the expiration of the said eleven years at, with and under the like rents, covenants and agreement as are in these presents mentioned, expressed or contained, and so often as every eleven years of the said term shall expire will grant and demise unto the said lessee such new lease of the said premises upon surrender of the old lease as aforesaid and paying such fine of £7 10s. on the day or time hereinbefore limited or appointed." The Court of Appeal (Lord Cozens-Hardy, M.R., and Eady and Pickford, L.JJ.) agreed with Joyce, J., that upon the true construction of the covenant the lessee was entitled to a perpetual renewal of the lease at the end of every successive period of eleven years, on surrender of the then existing lease and paying the stipulated fine.

EXECUTOR—RIGHT OF RETAINER—COVENANT TO PAY TO TRUSTEES OF MARRIAGE SETTLEMENT—STATUTE BARRED DEBT—CESTUI QUE TRUST OF DEBT ONE OF SEVERAL EXECUTORS OF COVENANTOR.

Re Sutherland, Michell v. Bubna (1914) 2 Ch. 720. In this case a right of retainer by an executrix was set up in somewhat peculiar circumstances. The claimant was the dowager duchess of Sutherland, and the claim arose in this way. By her father's marriage settlement in 1872 he covenanted to pay £3,000 to the trustees of the settlement. The duchess was the sole issue of the

marriage, and became absolutely beneficially entitled to the £3,000. Her father, having never paid the £3,000, died, leaving his widow sole executrix and residuary legatee of his estate, and directed the £3,000 to be paid. The widow died in 1912, without having paid the £3,000, but left a will appointing her daughter, the claimant, one of her executors. It was admitted that the claim of the trustees of the marriage settlement under the covenant was barred by the Statute of Limitations, but it was contended that the claimant, as one of the executors of her mother's estate, had a right to retain the £3,000 out of the assets of her mother's estate. But Joyce, J., who heard the case, considered that the inability of an executor to sue himself, which was the foundation of the right of retainer, did not exist in the present case, because the debt, if any, was due not to the claimant as *cestui que trust*, but to the trustees of the settlement, and the claimant's only right was to sue the trustees. The claim to retain was therefore disallowed.

CONTRACT—SEAT IN THEATRE—LICENSE—FORCIBLE REMOVAL
OF A SPECTATOR WHO HAD PAID FOR A SEAT—ASSAULT—
DAMAGES.

Hurst v. Picture Theatres (1915) 1 K.B. 1 is an interesting illustration of the effect of the Judicature Act in the administration of justice. The facts were very simple. The plaintiff had gone into the defendants' theatre to see moving pictures he paid for, and took his seat; but, after he had been there for some time, and while the show was in progress, the defendants' servants appeared to have come to the conclusion that he had got in without paying. They requested him to go and see the manager, which he declined to do. One of the defendants' servants then took hold of him and forcibly turned him out of his seat, whereupon he left the theatre without further resistance. The action was brought to recover damages for assault and false imprisonment, and the jury found that he had paid for his seat, and awarded him £150 damages. The defendants relied on the well-known case of *Wood v. Lead-bitter*, 13 M. & W. 838, where it was decided that a grant of an easement or incorporeal right affecting land could not be conveyed without deed, and that a ticket to view a race was only a revocable license. But the majority of the Court of Appeal (Buckley, Kennedy and Phillimore, L.JJ.) held that what was at law a mere revocable license would in equity be regarded as an agreement to give a deed sufficient to insure the licensee in getting what he bargained for, and therefore, as equity considers that to be done

which ought to be done, it gives effect to the equitable right as if it had been effectuated by a legal deed, and in the present case the majority of the Court of Appeal (Buckley, and Kennedy, L.JJ.) held that, having regard to the equitable rights of the plaintiff, he was entitled to recover the damages awarded. This case, therefore, establishes as law that when a man pays for a seat at a public entertainment so long as he behaves himself properly he has a legal right to stay and see the performance, and cannot be lawfully ejected by the owner of the premises so long as the entertainment lasts. *Wood v. Leadbitter* is by the majority of the Court regarded merely as the decision of a legal principle, but equitable principles, the Court holds, must also now be taken into consideration even in deciding a purely common law cause of action. Phillimore, L.J., dissented, because he considered that the cases in equity only applied where it was really intended to give an interest in land, but here he thought there could be said to be no intention to give any interest in land, but at the utmost a mere license which, whether it were made by deed or parol, was in its nature revocable according to *Wood v. Leadbitter*, which he regards as still good law applicable to like cases. The only remedy this learned Judge considers the plaintiff was entitled to was one for breach of contract; but he holds that in remaining after he was told to leave he became a trespasser, and therefore in his opinion had no right of action for being ejected.

CHEQUE—UNCONDITIONAL ORDER TO PAY—"TO BE RETAINED"
WRITTEN BY DRAWER ON FACE OF CHEQUE—BILLS OF EX-
CHANGE ACT (45-46 VICT. C. 61), ss. 3, 73—(R.S.C. C. 119,
ss. 17, 165).

- *Roberts v. Marsh* (1915) 1 K.B. 42. In this case the validity of an instrument as a cheque was in question, the peculiarity being that the drawer had written across its face, "to be retained." The cheque was written on ordinary paper, and at the time it was given the drawer promised to send a cheque on one of his banker's printed forms in substitution for it, which he failed to do. The cheque was presented and dishonoured, and the action was brought to recover the amount. The defence was that the instrument was not an unconditional order to pay, and therefore not a cheque within the meaning of the Bills of Exchange Act (45-46 Vict. c. 61), ss. 3, 73 (see R.S.C. c. 119, ss. 17, 165). The Court of Appeal (Buckley, Kennedy and Phillimore, L.JJ.) held that the words "to be retained" merely imported a condition between the drawer and drawee, and did not bind the bankers,

or prevent the instrument from being a valid cheque within the meaning of the Bills of Exchange Act. The judgment of Avory, J., in favour of the plaintiff was therefore affirmed.

CROWN—PREROGATIVE—SERVANTS OF THE CROWN—EXEMPTION FROM LIABILITY TO SUIT—INCORPORATION OF SERVANTS OF CROWN—AGREEMENT FOR TENANCY—BREACH OF CONTRACT—NUISANCE.

Roper v. The Commissioners of His Majesty's Works (1915) 1 K.B. 45. This was an action against the defendants, an incorporated body, as Commissioners of H. M. Board of Works. The defendants were lessees of certain premises of the plaintiff subject to certain terms *inter alia* that the defendants would not carry on any noisy business or occupation, nor permit or suffer any nuisance to arise or continue on the premises, and would keep the premises in repair. The plaintiffs claimed that in breach of the agreement the defendants had used the premises and suffered them to be used by loafers, and had under-let the premises to labour unions, which by reason of the congregation of men about the place created a nuisance, and that the defendants had also suffered the premises to be injured and destroyed. The plaintiffs claimed possession, damages for not repairing, and for the alleged nuisance, and mesne profits, or alternatively for an injunction restraining the defendants from using the premises contrary to the agreement, or permitting waste and destruction thereon. The defendants claimed as servants of the Crown to be exempt from liability to suit, for the alleged tort, notwithstanding they were incorporated, and this preliminary point of law was the subject of the present decision. Shearman, J., before whom the point was argued, held that the defendants, though incorporated, were nevertheless servants of the Crown, and as such exempt from liability to suit for torts, and so far as the action was in respect of alleged torts it must be stayed; but that as regards the claim for breach of contract it might, on the authority of *Graham v. Public Works Commissioners* (1901) 2 K.B. 781, be permitted to proceed.

PRACTICE—COSTS—"ISSUE"—EVENT—RULES 976, 977.

Howell v. Dering (1915) 1 K.B. 54. Under the English Rules 976, 977, unless the Judge at the trial directs otherwise, where there are several issues of law or fact the costs follow the event. This was an action against stock brokers for damages caused to the plaintiff by his having invested money on the faith of an

alleged fraudulent and false prospectus issued, as was claimed, by the defendant's authority. The jury found that the prospectus was not issued with the defendants' authority, and that they believed it to be true but that it was false, and that the defendant invested his money on the faith of it. The judgment was in favour of the defendants, and the Judge gave no special direction as to costs, but the judgment as drawn up gave the plaintiff the costs of the issue that the prospectus was fraudulent and false, and that he had invested his money on the faith of it. The defendants appealed from the judgment so far as it directed that the plaintiff should have any costs, and the Court of Appeal (Buckley, Kennedy and Phillimore, L.JJ.) allowed the appeal, being of the opinion that the question as to the fraudulent character of the prospectus, and the question whether the plaintiff had relied on it, were not "issues" within the meaning of the Rules, but merely links in the chain of facts whereby the liability of the defendants was sought to be established. The fact that they were put as separate questions to the jury did not make them "issues"; nor did the fact that they were disputed by the defendants. Definitions are proverbially difficult to make, but Buckley, L.J., offers the following: "An issue is that which, if decided in favour of the plaintiff, will in itself give a right to relief, or would, but for some after consideration, in itself give a right to relief; and if decided in favour of the defendant will in itself be a defence."

CARRIER—CARRIAGE OF GOODS—EXEMPTION FROM LIABILITY
"FOR ANY DAMAGE TO GOODS, HOWEVER CAUSED, WHICH CAN
BE COVERED BY INSURANCE"—DAMAGE OWING TO NEGLIGENCE OF CARRIER—EVIDENCE WHETHER NEGLIGENCE CAUSED
LOSS—ONUS OF PROOF.

Travers v. Cooper (1915) 1 K.B. 73. The defendants in this case were carriers of goods on a barge, under a contract which exempted the defendants from liability for any damage, "however caused," which could be covered by insurance. The barge was left unattended alongside a wharf ready to be unloaded. It took ground at low tide, and when the tide came in it was submerged and the goods were damaged. It was not clear on the evidence whether the fact that the barge was unattended had occasioned the loss. The defendant's theory was that when the tide went out the barge became mud-sucked, and when it came in, even if anyone had been on her the damage could not have been avoided. Pickford, J., who tried the case, gave judgment in favour of the de-

fendant, because the plaintiff had failed to shew that his negligence had caused the action, but the Court of Appeal (Buckley, Kennedy and Phillimore, L.JJ.) were unanimous that the onus was on the defendant of shewing that his negligence had not occasioned the loss; but the majority of the Court (Kennedy and Phillimore, L.JJ.) held that the terms of the contract were sufficient to exonerate the defendant from liability even though it was due to his negligence; but Buckley, L.J., dissented from that view, and was of the opinion that, notwithstanding its general terms, there was an implied exception of losses which the defendant by his own negligence should occasion. The majority of the Court distinguish the case from those relied on by Buckley, L.J., by the fact of there being in the contract in question in this case the words, "however caused."

SUNDAY OBSERVANCE—REFRESHMENT HOUSE—EXCISE LICENSE—
SALE OF ICE-CREAM ON SUNDAY—SUNDAY OBSERVANCE ACT,
1677 (29 CAR. II. c. 7), ss. 1, 3.

Amorette v. James (1915) 1 K.B. 124. This was a case stated by justices. The defendant kept a refreshment house for which he held an excise licence. He sold ice-cream on Sunday after 8.50 p.m., and the simple question submitted was whether the fact that he held a licence exempted him from liability under the Sunday Observance Act (29 Car. II. c. 7), s. 1, and the Divisional Court (Horridge and Shearman, JJ.) held that it did not. The Court, however, is careful to say that they do not decide that ice-cream may not be "meat" within the meaning of s. 3 of the Act, and as such be lawfully saleable; but on the case stated they held that it was not open. The learned Judges profess a curious ignorance of what "ice-cream" is composed, and whether, as a matter of law, it would come within the category of food or drink. The question, licence or no licence, in the opinion of the Court, did not in any way affect the construction of the Act.

WAR—CONTRACT—MARINE INSURANCE—ALIEN ENEMY—RIGHT
OF ACTION AGAINST ALIEN ENEMY—APPLICATION BY ALIEN
ENEMY TO STAY PROCEEDINGS.

Robinson v. Continental Insurance Co. (1915) 1 K.B. 155. This was an action to recover the amount of a policy of marine insurance. The contract was made with the defendants, a German insurance company, and the loss occurred and the action was brought and pleadings closed before the war began. The defendants applied to stay the proceedings during the war.

Bailhache, J., to whom the application was made, came to the conclusion that although an alien enemy cannot sue in British Courts during a war, yet there is nothing to prevent an alien enemy from being sued except the possible difficulty of serving him, and that as the plaintiff may sue so also the defendant is at liberty to appear and defend such an action, but whether an alien enemy could recover costs, if any, awarded him during the war, he doubted.

LANDLORD AND TENANT—AGREEMENT FOR LEASE—ASSIGNMENT
BY DEED—NO ENTRY BY ASSIGNEE—PRIVITY OF CONTRACT—
PRIVITY OF ESTATE—LIABILITY OF ASSIGNEE FOR RENT.

Purchase v. Lichfield Brewery Co. (1915) 1 K.B. 184. In this case the plaintiff sought to make the defendants, who were assignees of a term liable for the rent of the demised premises. Lumis, the original lessee for a term of 15 years, held under an agreement for a lease not under seal which he assigned by way of mortgage to the defendants, who neither executed the deed, nor made any entry on the premises. The County Court Judge, who tried the action, gave judgment for the plaintiff, thinking the case was governed by *Williams v. Bosanquet* (1819) 1 Brod. & B. 238; but the Divisional Court (Horridge and Lush, JJ.) held that the agreement under which the original lessee held was not a lease but merely an agreement for a lease, and that notwithstanding the lessee might have had an equitable right to demand a legal lease, yet the assignee of the agreement by way of mortgage had not necessarily that right; that as between the plaintiff and the defendants there was neither privity of contract nor privity of estate, and therefore the action could not be maintained. The case is distinguished from *Williams v. Bosanquet* because there the lease was under seal, and here no term was created, but merely an agreement for a term, and from *Walsh v. Lonsdale*, 21 Ch.D. 9, because there the assignee had entered into possession.

RAILWAY—CARRIAGE OF GOODS—SPECIAL CONTRACT—"OWNER'S
RISK"—NON-DELIVERY OF ANY CONSIGNMENT—NON-DELIV-
ERY OF PART OF CONSIGNMENT.

Wills v. Great Western Ry. (1915) 1 K.B. 199. This was an appeal from the decision of Bray and Lush, JJ. (1914) 1 K.B. 263 (noted *ante* vol. 50, p. 224). The action was for damages for non-delivery of goods by a railway company. The goods were received by the company under a special contract which provided that the company should be relieved from "all liability for loss,

damage, mis-delivery, delay, or detention," unless arising from the wilful misconduct of their servants, but not from any liability they might otherwise incur in the case of "non-delivery of any package or consignment fully and properly addressed," and that "no claim in respect of goods for loss or damage during the transit" should be allowed unless made "within three days after delivery of the goods in respect of which the claim is made, or in the case of non-delivery of any package or consignment, within fourteen days after despatch." The goods in question consisted of a quantity of carcasses, and on the arrival of the consignment at its destination some of them were missing, for which the plaintiffs made a claim within fourteen days of the despatch of the consignment. The majority of the Court of Appeal (Buckley, and Pickford, L.JJ.) agreed with the Divisional Court that the non-delivery of part of the consignment was "non-delivery of the consignment" within the meaning of the contract, and that the claim was made in time, and that the plaintiff was entitled to recover damages therefor. Phillimore, L.J., dissented, on the ground that he thought that as the bulk of the consignment was delivered the claim for shortage should have been made within three days after its delivery, and that it was only where the whole consignment was not delivered that 14 days was allowed for making the claim.

PRINCIPAL AND AGENT—SOLICITOR AND CLIENT—ORDER FOR PHOTOGRAPHS FOR DEFENCE OF CLIENT—LIABILITY OF SOLICITOR—KNOWLEDGE THAT SOLICITOR IN GIVING ORDER IS ACTING FOR A CLIENT.

Wakefield v. Duckworth (1915) 1 K.B. 218 is a case which will be of interest to the profession, inasmuch as the Divisional Court (Coleridge and Shearman, JJ.) have decided that where a solicitor orders photographs to be made for the purposes of a client's defence, and the photographer knows that the solicitor is acting for a client, the solicitor incurs no personal liability to pay for such photographs.

WILL—TRUST—LIFE INTEREST—PROVISION FOR CESSER IN CASE OF ATTEMPT TO ALIENATE—INCOME ACCRUING BEFORE BUT NOT RECEIVED TILL AFTER ALIENATION—APPORTIONMENT ACT (33-34 VICT. c. 35), s. 2—(R.S.O. c. 156, s. 4).

In re Jenkins, Williams v. Jenkins (1915) 1 Ch. 46. In this case it was attempted to apply the Apportionment Act (33-34 Vict. c. 35), s. 2 (see R.S.O. c. 156, s. 4), in the following circum-

stances: A testator gave a share of his estate to trustees upon trust to pay the income to his son for life, but directed that any income for the time being payable to him "shall only be paid to him so long as he shall not attempt to assign or charge the same." The son by deed purported to assign his life interest by way of mortgage to secure money lent. At the date of the mortgage the trustees had in their hands £356, representing income previously accrued to which the son was entitled, and received by them before that date; they subsequently received £393, of which, if apportioned, £254 would represent the part attributable to the period prior to the date of the mortgage. The mortgagee claimed that the Apportionment Act applied, and that he was entitled to the £254 as well as the £356. Sargant, J., however, held that the Apportionment Act did not apply, and though the mortgagee was entitled to the £356, he was not entitled to the £254, as, in his opinion, the effect of the clause in the will above referred to was to prevent the destination of the income being finally determined until it had actually become payable to the tenant for life.

ALIEN ENEMY—RIGHT OF ALIEN ENEMY TO SUE—RESIDENCE IN UNITED KINGDOM—REGISTRATION—ALIENS' RESTRICTION ACT, 1914 (4-5 GEO. V. C. 12)—ALIEN'S RESTRICTION ORDER, 1914.

Thurn v. Moffitt (1915) 1 Ch. 58. The plaintiff in this case was an alien enemy registered under the Alien's Restriction Act, 1914, and Aliens' Restriction Order, 1914. The action was for an injunction to restrain the publication of alleged libels against the plaintiff. The husband of the plaintiff was an alien enemy resident out of the United Kingdom. The defendant moved to stay the proceedings, on the ground that the plaintiff had no greater rights than her husband. But Sargant, J., held that as the claim of the plaintiff was one peculiar to herself individually, and as she had been duly registered, she was entitled to prosecute the action, and the application was therefore refused with costs.

ERRATUM.

P. 101, 1st par., 6th line from bottom, for "plaintiff's grandfather" read "plaintiff."

Reports and Notes of Cases.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ATTORNEY-GENERAL OF ALBERTA *v.* THE ATTORNEY-GENERAL OF THE DOMINION, CANADIAN PACIFIC RY. CO. INTERVENANTS.

Railways—Powers of Dominion and Provincial Legislatures, B. & A. Act, sec. 91, sub-sec. 29, sec. 92, sub-sec. 10.

This was an appeal by the Attorney-General of the Province of Alberta from the Supreme Court of Canada.

It is *ultra vires* for the legislature of a province of the Dominion of Canada to pass an Act authorising a provincial railway to be carried across a Dominion railway.

By an Act of a provincial legislature a provincial railway company was empowered to "take possession of, use, or occupy any lands belonging to" a Dominion railway company, "in so far as the taking of such land does not unreasonably interfere with the construction and operation of" such railway.

Held, that this provision in the Act was *ultra vires* of the provincial legislature, and the omission of the word "unreasonably" would not take such legislation *intra vires*.

Decision of the Supreme Court of Canada affirmed.

Sir Robert Finlay, K.C., S. B. Woods, K.C. (Attorney-General of Alberta), and Geoffrey Lawrence for the appellants. E. L. Newcombe, K.C., and Raymond Asquith for respondent. E. Lafleur, K.C., for Canadian Pacific Ry. Co.

Dominion of Canada.

SUPREME COURT.

Alta.]

[Feb. 2, 1915.

SASKATCHEWAN LAND AND HOMESTEAD CO. AND TRUSTS AND GUARANTEE CO. *v.* CALGARY AND EDMONTON RY. CO.

Railways—Expropriation—Materials for construction—Statute—Railway Act, R.S.C. 1906, c. 37, ss. 180, 191, 192, 193, 194, 196—Compensation—Date for ascertainment of value—Order for possession—Deposit of plans—Approval of Board of Railway Commissioners.

With regard to obtaining materials for the construction of railways, the effect of sub-section 2 of section 180 of the Rail-

way Act, R.S.C., 1906, c. 37, merely requires the general provisions of the Act relating to the using and taking of lands to be observed in so far as they are appropriate to the expropriation of the lands and settling the compensation to be paid therefor; section 192 of the Act has no application to such a case.

Notices were given, in compliance with sections 180, 193, and 194 of the Railway Act, and, before any change had taken place in respect to the value of the lands to be taken, the railway company obtained an order of a judge permitting it to do so, and took possession of the lands in question.

Held, that the title of the company to the lands, when consummated, must be considered as relating back to the date when such possession was taken and that the compensation payable therefor should be ascertained with reference to that time.

Judgment appealed from (6 Alta. L.R. 471) affirmed.

Appeal dismissed with costs.

Whiting, K.C., and *A. B. Cunningham*, for the appellants.
O. M. Biggar, K.C., for the respondents.

Sask.]

[Feb. 2.

TRUSTEES OF REGINA PUBLIC SCHOOL v. TRUSTEES OF GRATTON
SEPARATE SCHOOL.

Education—School boards—Assessment and taxation—Taxes payable by incorporated companies—Apportionment—Shares for public and separate school purposes—Notice—Construction of statute—Legislative jurisdiction—B.N.A. Act, 1867, s. 92—Saskatchewan Act, 4 & 5 Edw. VII., c. 42, s. 17—School Assessment Act, R. S. Sask., 1909, c. 101, ss. 93, 93a.

Sec. 93 of the Saskatchewan School Assessment Act, R. S. Sask., 1909, c. 101, authorizes any incorporated company to give a notice requiring a portion of the school taxes payable by the company to be applied to the purposes of separate schools, and section 93a, as enacted by section 3 of chap. 36 of the Saskatchewan statutes of 1912-1913, authorizes separate school boards themselves to give a similar notice to any company which fails to give the notice authorized by section 93. A number of companies neglected to give the notice provided for and the separate school board gave them notices requiring a portion of their taxes to be applied for the purposes of that board. In these circumstances the public school board claimed the whole of the taxes

payable by the companies in question and the separate school board claimed a portion of such taxes. On a special case, directed on the application of the municipal corporation, questions were submitted for decision, as follows:—(a) Had the Saskatchewan Legislature jurisdiction to enact section 93a of the School Assessment Act''; (b) If question (a) be answered in the negative, has the defendant (the separate school board), the right it claims to a portion of the said taxes; (c) If question (a) be answered in the affirmative, has the defendant the right it claims to a portion of the said taxes?

Per DAVIES and DUFF, JJ., (expressing no opinion as to the constitutionality of the legislation), that the effect of the enactments in question was not to give the separate school board any portion of the taxes claimed by it. The Chief Justice and Anglin, J., *contra*.

Per IDINGTON, J.:—The enactment of section 93a was ultra vires of the Legislature of Saskatchewan. The Chief Justice and Anglin, J., *contra*.

Per FITZPATRICK, C.J., and ANGLIN, J.:—The Legislature of Saskatchewan had jurisdiction to enact section 93a of the School Assessment Act, and the taxes payable by the companies in question should be apportioned between the public and the separate school boards in shares corresponding with the total assessed value of assessable property assessed to persons other than incorporated companies for public school purposes and the total assessed value of property assessed to persons other than incorporated companies for separate school purposes respectively.

Judgment appealed from, reversed, the Chief Justice and Anglin, J., dissenting.

Appeal allowed with costs.

Nesbitt, K.C., and *Chris. C. Robinson*, for the appellant. *H. Y. Macdonald*, K.C., for the respondent.

War Notes.

LAWYERS AT THE FRONT.

We join in the loud acclaim of praise and admiration that has in all parts of the world greeted the news of the heroic devotion of the Canadian troops in the recent fighting at Neuve Chapelle and Ypres. But we in Canada, seeking as we do to emulate the highest ideals of British valour, do not care to make

too much of it, for—"How else did you think our boys would act"? A statue outside the Parliament Buildings in Ottawa tells of the heroism of one who refused to accept the advice of a friend not to sacrifice his life in a quixotic attempt to save the life of a drowning girl. He knew it was impossible, but he made the fatal plunge, simply replying, "What else can I do." The occasion came to our men at Ypres to do a seemingly impossible thing. Careless of all but their honour and the honour of their country they did the impossible; and, as recorded by such men as Field Marshall French and General Joffre, they "saved the situation" and blocked the road to Calais. The casualty lists tell the tale of what the sacrifice was. History does not accord a quicker grasp of a crisis, more dauntless courage, dash and endurance than what was done by these volunteer soldiers in their first hard fight.

The names of the members of the profession who have gone on active service in connection with the present war are of increasing interest, as we are beginning to hear, from day to day, of those who have been wounded or who have given their lives for King and Country.

It is difficult to get a complete record from the various provinces of the Dominion of those who have joined the ranks. At present we can only give lists from the Provinces of Ontario and Saskatchewan, as received from the Law Societies of those Provinces, made up about the middle of March last. These are as follows:—

PROVINCE OF ONTARIO.

STUDENTS—First Year:—J. R. Cartwright, Toronto; R. M. W. Chitty, London, Eng.; J. S. Ditchburn, Toronto; O. W. Grant, Toronto; H. E. M. Ince, Toronto; T. E. Kelly, Toronto; W. G. Kerr, Chatham; W. A. Kirkconnell, Lindsay; A. H. Lightbourn, Oakville; W. J. O'Brien, Peterborough, 7th Battery, 25th Brigade, University Section; A. R. M. O'Connor, Ottawa; H. E. B. Platt, Toronto; W. H. Schoenberger, Toronto; J. C. Tuthill, Toronto; C. C. Warner, Toronto; W. C. Hearn, Toronto.

Second Year:—R. T. Bethune, Toronto; R. B. Duggan, Brampton, 36th Peel Regiment, 3rd C. E. F.; E. A. H. Martin, Hamilton; K. H. McCrimmon, Toronto; Reginald J. Orde, Ottawa (Lieut. Royal Field Battery); M. F. Wilkes, Brantford; R. H. Yeates, Toronto, 8th Battery, Canadian Artillery.

Third Year:—H. R. Alley, Toronto; P. L. Armstrong, Ottawa; McGillivray Aylesworth, Newburgh; J. S. Bell, Chesley; W. D. Bell, St. Thomas; J. G. Bole, Toronto; C. W. G. Gibson, Hamilton; W. L. L. Gordon, Toronto; H. S. Hamilton, S.S. Marie; L. C. Jarvis, London; A. J. Johnson, Toronto; Keith Munro, Port Arthur; N. M. Young, Barrie.

BARRISTERS AND SOLICITORS:—W. S. Buell, Brockville; P. J. M. Anderson, Belleville; G. W. M. Ballard, Hamilton; Everett Bristol, Hamilton; G. T. Denison, Toronto; W. W. Denison, Toronto; R. M. Dennistoun, Winnipeg; F. B. Goodwillie, Melfort, Sask.; F. R. Forneret, Hamilton; H. W. A. Foster, Toronto; Walter Gow, Toronto; F. H. Greenlees, London; F. W. Hill, Niagara Falls; S. C. S. Kerr, Toronto; J. M. Macdonnell, Toronto; E. L. Newcombe, Ottawa; A. C. T. Lewis, Ottawa; W. A. Logie, Hamilton; T. B. Malone, Edmonton, Alta.; M. S. Mercer, Toronto; Frank Morison, Hamilton; Thomas Moss, Toronto; H. S. Murton, Toronto; N. S. Macdonnell, Toronto; D. H. McLean, Ottawa; L. C. Outerbridge, Toronto; E. D. O'Flynn, Belleville; Eric Pepler, Toronto; (Engineers); R. D. Ponton, Belleville; G. B. Strathy, Toronto; C. A. Thomson, Toronto; E. S. Wigle, Windsor; Chas. H. MacLaren; L. P. Sherwood; G. R. Geary, K.C.

PROVINCE OF SASKATCHEWAN.

John Muir (of Broatch, Lennox, Muir & Co.), Moose Jaw; Peter McLellan (of Archer & McLellan), Arcola; M. A. McPherson (of Buckles, Donald & McPherson), Swift Current; Norman Gentles (of Seaborn, Taylor, Pope & Co.), Moose Jaw; A. W. Goldsworthy (with O. D. Hill), Melfort; Robt. M. Cunningham (Murray & Munro), Saskatoon; Harold E. Hartney, Saskatoon; Archibald McLean, Kerrobert; Alexander Ross, K.C., Regina; Maughan McCausland (of Wood & McCausland), Regina; William S. Walker, Battleford; J. F. L. Embury, K.C. (of Embury, Scott & Co.), Regina; F. B. Goodwillie, Melfort; Russell A. Carman, Balgonie; F. B. Bagshaw (of Anderson, Bagshaw & Co.), Regina; Alister Fraser (of Knowles, Hare & Benson), Moose Jaw; Austin S. Trotter, Melville; George C. Thomson, Swift Current; John Munro (of Murray & Munro), Saskatoon; William A. Reeve, Qu'Appelle; F. G. D. Quirk (of Seaborn, Taylor, Pope & Quirk), Moose Jaw; E. M. Thomson (of Torney & Thomson), Moose Jaw.

CASUALTIES.

Lists of casualties in the recent battles near Neuve Chapelle and Ypres are coming in from day to day, but, so far as the profession is concerned, they are by no means either full or accurate.

The names of those who have been killed so far as ascertained at the time of writing are as follows:—

LT.-COL. W. HART MCHARG.

He was the son of a British Army officer. He resided for some time at Rossland, B.C., removing in 1903 to Vancouver, where he practiced law in partnership with Mr. Hume Abbott. At the time Canada's First Contingent was formed for South Africa he was among the first to apply for a commission in the Canadian force; but, failing to secure that, he promptly enlisted as a private. He went through the war returning as a sergeant. His account of the South African war, as seen by a Canadian (known as "Quebec to Pretoria") is very interesting reading. In Vancouver he was the most active officer in the Duke of Connaught's Corps and was an extremely popular officer as well as a prominent and highly esteemed citizen. He acquired a great reputation as a marksman, and, in 1913, won the title of champion rifle shot of this continent. He had previously represented Canada at Bisley where he made a great record, and on two occasions won the Governor-General's prize. His death is a serious loss to his country and to the profession.

CAPTAIN WALTER LESLIE LOCKHART GORDON

Was the fourth son of W. H. Lockhart Gordon, Barrister, Toronto. He was in his 25th year, was educated at Ridley College and afterwards at the Royal Military College, Kingston. At the conclusion of a distinguished career at R. M. C., where he was battalion Sergeant-major, he graduated in 1911, winning the sword of honour, the highest award in the gift of the College, and was honour man of his year. When he volunteered for the front he was an officer of the Mississauga Horse. He went to Valcartier as a lieutenant, and at Salisbury Plain he was promoted to a Captaincy. In the action near Ypres where he was killed he was in command of "B" Company in the Second Battalion of the First Canadian Division. Captain Gordon after completing his course at the Law School, in 1914, was connected with the firm of Bain, Bicknell, Macdonell and Gordon. His elder brother, Lieut.-Col. H. D. Lockhart Gordon, is

squadron commander with the 4th Canadian Mounted Rifles. Another brother, Maitland Lockhart Gordon, who went over with the first contingent, recently received a commission in the Gordon Highlanders; while Lieut. Molyneaux Lockhart Gordon is now in the Southern States convalescing after a serious accident at the Cavalry School—four splendid fellows from one household upholding the honour of the Flag. Captain Gordon was a young man of great promise with a brilliant career before him. A large circle of friends will deplore his loss and sympathise with the bereaved family.

Rising, roaring, rushing like the tide

(Gay go the Gordons to a fight)

They're up thro' the fire zone, not to be denied,

(Bayonets! and charge! by the right!)

There are bullets by the hundred buzzing in the air,

There are bonny lads lying on the hillside bare;

But the Gordons know what the Gordons dare

When they hear the piper playing!

(NEWBOLDT.)

LIEUT. JOHN L. REYNOLDS

Of Winnipeg. He had just completed his last year as a law student, but left for the front before being called to the Bar. Was a son of Capt. Reynolds, now in France on the General Staff.

THE WOUNDED AND MISSING.

Amongst the wounded is Lt.-Col. W. S. Buell, of Brockville. He commenced the practice of law in Vancouver, but upon his father's death returned to Brockville where he acquired a large practice. In 1897 he joined the 41st Regiment as lieutenant and rose to the position of its Commanding Officer. He was on the staff of the Canadian Militia officers sent by the Dominion Government to the manœuvres of Britain and France in 1913.

Major A. T. Hunter was wounded in the same fight. A lawyer by profession and one of the most popular officers of the York Rangers, he was well known both in legal and military circles. His cablegram to his family telling them that he was in the hospital at Boulogne-sur-mer is so characteristic as to be worth quoting:—"Shrapnel bounced off. Head as usual unreceptive. Convalescent."

Captain G. H. Ross, attached to the 16th Battalion and Captain of the 72nd Regiment, is reported as wounded and missing.

He enlisted in Winnipeg with the 79th Cameron Highlanders, but was subsequently transferred to the Vancouver Regiment. He is a member of the law firm of Macdonald, Tarr, Creig and Ross of Winnipeg. We trust he will turn up soon not much the worse, but the report is not reassuring.

Lieut. G. L. DeCourcy O'Grady is reported wounded. He was formerly of the 90th Winnipeg Rifles, but now attached to the 8th Battalion. He is said to be in a hospital at Boulogne.

Amongst the wounded we also record the names of Captain G. W. Jameson, of Winnipeg, G. M. Ballard, of Hamilton, N. M. Young, Barrie, and Lt.-Col. J. J. Creelman, of Montreal. Lieut. R. R. McKessock, K.C., of Sudbury, and Lieut. John Kidd Bell, of Winnipeg, are reported as missing.

NEUTRALITY.

A leading journal thus arraigns the President of the United States as to his attitude on this question:—

"But there is another person who must in a way share some responsibility for the devilish methods to which Germany is resorting. That is the President of the United States. He has made it abundantly clear that no 'frightfulness' which Germany may employ will cause him to express his country's disapproval. He will remain neutral to the end, even if the Germans should poison all the springs and rivers in France and Belgium and burn civilians at the stake. He has been dumb in face of the gigantic wrong done Belgium, and in face of one violation after another of the rules of civilized warfare. Germany, therefore, knows that she does not risk loss of the official and formal friendship of the United States, no matter what horrors are committed in her name. If President Wilson, having first satisfied himself that the charges made against the German soldiers are well founded, should speak for his country and express his indignation at the crimes, we believe they would be repudiated and their repetition made impossible. President Wilson has only to speak. Not an American bullet need be fired."

These are the sentiments not merely of a Britisher, but, we understand, of the thinking men and women of America. President Wilson and his confrères are soiling the honour and reputation of the great nation they now *mis*-represent.

Professor Ladd, of Yale, strikes the true note when he says that a nation which is neutral under present conditions "is not a nation fit to live" and "gives evidence of moral degeneracy."

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THE SINKING OF THE "LUSITANIA."

War has been aptly defined as "an effort by a belligerent to bend its enemy to its will by all means in its power, which do not violate neutral rights or are not ruled out as inhuman."

The sinking of the "Lusitania," an unarmed passenger vessel, by a German submarine, without warning and without provision or attempt to prevent the appalling loss of life of noncombatant passengers and crew, transgresses the lawful resources of civilized warfare in both respects. It is a flagrant violation of neutral rights in the destruction of neutral lives and property; and unspeakably inhuman. The act is utterly without precedent, and utterly indefensible according to any existing standards of International Law, and may be regarded as the culmination of deliberate acts of terrorism on the part of the German Government in deliberate disregard of fundamental principles of International Law to which that Government has repeatedly expressed its adherence.

It is not a question of blockade, if blockade is to retain any semblance of its accepted meaning and essentials for three generations. The essence of blockade, since the Declaration of Paris of 1856 (to which Prussia is a party), is (1) efficiency of patrol by preponderant naval strength "sufficient really to prevent access to the coastline of the enemy" (Art. 4), and (2) notice, legal and physical notice, to neutrals. The "Lusitania" was an enemy ship, and as such was lawful prize on the high seas. Blockade contemplates neutral, and not enemy, ships. The penalty for breach of blockade is capture and condemnation—not destruction. We do not recall a single instance of the destruction of a blockade runner, but, in any case, misconduct of the ship and protection of life would be indispensable conditions. If the exigencies of the

submarine do not permit compliance with these well-settled principles, a submarine blockade is a contradiction in terms.

The law of contraband provides no defence. As an enemy ship, the carriage of contraband was not required for her capture. On the other hand, the fact that she was carrying munitions of war to a belligerent, if established, would not justify her destruction. The carriage of contraband does not justify the destruction of a neutral ship, except in the extreme case, grudgingly allowed by International Law, of an overriding necessity to the captor in the form of an emergency (such as pressing danger from the enemy) which leaves no reasonable alternative—"a military necessity bordering upon self preservation" (Rear Admiral Stockton, U.S. Navy, p. 454); and in that case only on terms that "all persons on board be placed in safety" (*ib*). And capture must be preceded by visit and search, with prescribed formalities, which include the preservation of the ship's papers for the prize court, on whose decision condemnation or release will be duly determined.

While different considerations may apply to the destruction of an enemy merchantman, the value of the prize will normally restrain its destruction; but, as a rule, the captured vessel must not be destroyed, but sent in to port as a prize. In the well-compiled instructions to the United States cruisers in the Spanish-American War, which are in accord with the best opinion and practice on the subject, it was stated, in regard to enemy captures, that "if there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold; and if this cannot be done they may be destroyed. But in all such cases all the papers and other testimony should be sent to the prize court in order that a decree may be duly entered."

The German naval prize regulations of 1909 place enemy and merchant ships in the same category in respect of destruction in the provision that officers may stop enemy and neutral ships for search and capture, and "in exceptional cases may destroy

them." Article 116 provides that, before a vessel is destroyed all persons on board with their goods and chattels are to be placed in safety, if possible. Westlake (2nd ed., p. 309) is to the same effect, as follows: "And in any case of the destruction of a ship, enemy or neutral, it would be the destroyer's duty to save the men and to preserve all the papers and other evidence which might assist a neutral claimant in proving that innocent property of his had been destroyed."

The case against destruction, it will be seen, is still stronger if, as the "Lusitania" undoubtedly was, the enemy ship is carrying neutral merchandise. Neutral goods, not contraband, are exempt from capture under the enemy's flag by the Declaration of Paris, 1856, and by the unvarying practice of all nations since that date, and the neutral owner is entitled to the decision of a prize court and to the return of his innocent property or compensation. Mr. W. E. Hall points out that a general direction by a belligerent to destroy enemy vessels, instead of bringing them in for condemnation, would amount to an illegal prohibition to neutrals from engaging vessels which they have the express right to engage under the Declaration of Paris, and concludes: "It ought to be incumbent upon a captor who destroys such goods, together with his enemy's vessel, to prove to the satisfaction of the prize court, and not merely to allege, that he has acted under the pressure of a real military necessity."

But all such questions are overwhelmed in the horrible slaughter of over twelve hundred defenceless noncombatants, women and children of a friendly power among them. All authorities are at one with Wheaton that "the custom of civilized nations has exempted, not only women and children, but generally all public and private individuals engaged in the ordinary pursuits of life, from the direct effect of military operations." The instructions for the government of the armies of the United States in the field (sec. 21) declares: "The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit," and (sec. 23) "private citizens are no longer mur-

dered." The passenger on an enemy's ship resisting visitation or search is involved with the fate of the ship. Noncombatants who remain in a bombarded town must take the risk of *stray* explosives, although deliberate fire on its residential parts to expedite surrender through the terror of the inhabitants would be illegal. Subject to "exigencies" of this nature the innocent noncombatant, even of the enemy, has hitherto been regarded as beyond the range of personal harm in war—the neutral non-combatant, *a fortiori*.

Modern history affords no parallel of the destruction of non-combatants on the ground of "military necessity," and lawyers are familiar with the safeguards with which positive law surrounds this defence (*e.g.*, *Reg. v. Dudley*, 14 Q.B.D. 473). Necessity, in law, implies immediate, imminent peril, leaving no place for choice or deliberation. The plain facts of the case and the unanimous verdict of mankind have negated any such plea. And it is wholly immaterial to the issue whether the "Lusitania" was, or was not, in the sense that, in certain events, she was at the disposal of the British Government, an auxiliary cruiser. At the moment of attack she was a passenger vessel, and nothing else, with over 2,100 human beings on board, secure from harm on established principles of International Law, to whom suffering and death were the natural (and inevitable) consequence of her destruction as carried out.

Utterly beyond the pale of any recognized principles of law, the German position that the "necessity of war must override its rules," or, in other words, that the accepted law of nations is subordinate to, and may be *validly* overridden by, the opinion of a commanding officer as to the military requirements of his particular operation, is a direct challenge to the foundations of International Law on which our modern civilization is largely based. Students of International Law are not wholly taken by surprise. German jurists have proclaimed this pernicious doctrine.

In the discussion of floating mines at the last Hague Conference, the German delegate is reported to have said: "Military acts are not governed solely by principles of International Law.

There are other factors. Conscience, good sense, and the sentiment of duty imposed by principles of humanity, will be the surest guides for the conduct of sailors . . . The officers of the German navy, I loudly proclaim it, will always fulfil in the strictest fashion the duties which emanate from the unwritten law of humanity and civilization."

The neat question is presented, whether standards which permit the slaughter of women and children or the principles of International Law, which brand it as murder, are to prevail. The issue is sharply defined in the "Lusitania" case, and there is no other issue. There is no room for doubt as to the attitude of the United States.

McGREGOR YOUNG.

REPRISALS.

Although the general sense of the country, as indicated by speeches in both Houses of Parliament and by numerous articles in the lay Press, is opposed to the exercise of reprisals by reason of the violation of the laws of war by the Germans in the cases of the treatment of prisoners of war and the use of asphyxiating and deleterious gases, it should not be forgotten that reprisals between belligerents are admissible for every act of illegitimate warfare. Wheaton has enunciated the proposition, to which he has given the weight of his high authority: "The whole international law is founded on reciprocity to which there is the unavoidable corollary that, if an enemy violates the established usages of war, it may become the duty as well as the right of his adversary to retaliate in order to prevent further excesses on his part. It is for the consideration of the injured belligerent as to whether he will at once resort to reprisals or before doing so will lodge complaints with the enemy or with neutral States. Practically, however, a belligerent will rarely resort at once to reprisals, provided the violation of the rules of legitimate warfare is not very grave and the safety of his troops do not require strong and drastic measures." Lord Roberts, for instance, during the South

African War, ordered by way of reprisal the destruction of houses and farms in the vicinity of the place where damage was done to the lines of communication. Reprisals may be employed by way of punishment for breaches of the rules of war. The only reference to punishment in the Hague Conventions is in the words, "a belligerent party which violates the provisions of the said regulations shall, if the case demands, be liable to compensation" (Art. 3 of Convention IV. of 1907), and, as no reference is made to reprisals, we are thrown back upon the general principle, which applies to the whole of these regulations, that, in cases not included in the regulations, populations and belligerents remain under the protection and the rule of the principles of the law of nations as they result from the usages established between civilised nations, the laws of humanity and the requirements of the public conscience: (Preamble to Convention II. of 1899 and IV. of 1907). The Hague Conventions do not mention reprisals because the Brussels Conference of 1874, which accepted the unratified Brussels Declaration, had struck out several sections of the Russian draft code regarding reprisals.—*Law Times*.

The May number of the *Law Magazine and Review* has an interesting article on the same subject. One writer discusses the law of nations in relation to reprisals in warfare, not that International Law is of much importance when Germany is concerned. That nation's disregard of law, of treaties, of the ordinary rules of civilization and of the dictates of humanity, has covered it with loathing and contempt. In speaking of the nature of reprisals and their justification, the following conclusions are reached: (1) that they have been recognised through all the ages as a means of securing legitimate warfare; (2) they ought not to exceed in severity the evil sought to be redressed; (3) while it is eminently desirable that the persons to suffer from reprisals should be the actual wrongdoers, yet this is not a *sine qua non*, and innocent persons may be made the victims.

PRIORITIES UNDER THE CREDITOR'S RELIEF ACT.

One effect of the Creditor's Relief Act (R.S.O. c. 81) is to complicate what was formerly a comparatively simple question, viz., the priorities of execution creditors. The main object of the Act is plainly to secure as far as possible, the payment of creditors *pari passu* and as between them, to eliminate the possibility of one execution creditor by any superior diligence, gaining any priority over another. But in the application of the Act difficulties arise, when the question as to the priorities of creditors is embarrassed by the intervention of the claims of specific incumbrancers. Such a difficulty arose in the recent case of *Union Bank of Canada v. Taylor*, 8 O.W.N. 72. That appears to have been an action to set aside a fraudulent conveyance in which judgment was given declaring the deed void and ordering a sale of the land and the application of the proceeds in payment of the claims of creditors and of the incumbrancers according to their respective priorities. The Master to whom the case was referred, found several classes of incumbrancers and execution creditors whom he classified as follows: A. a group of execution creditors; B. plaintiff's mortgage; C. a group of subsequent creditors; D. a second mortgage; E. a third mortgage; F. another group of execution creditors; G. a fourth mortgage; H. another group of subsequent creditors. The amount realized was apparently insufficient to satisfy all the claims and the Master settled the priorities of the various claimants in the order above-mentioned. An appeal was had to Boyd, C., and it was contended that the Master should have followed the directions of the Creditor's Relief Act, s. 33, sub-ss. 11, 12; but the appeal was dismissed and the Master's report affirmed.

The learned Chancellor is reported to have said, "The effect of the Act appears to be to pay a subsequent mortgagee in full by reducing the amount of a prior execution and this gives to a subsequent mortgagee a better status as against a prior execution charged on the lands than existed when the mortgage trans-

action was effected between the owner and the mortgagee. If this is the meaning and result of the Act, I do not feel disposed to extend its methods to the distribution of assets in this court."

How far this is a valid reason for refusing to give effect to the Act we do not propose to discuss. There can be no doubt, however, that to apply its provisions to the case in hand would have led to a curious and perhaps a not very satisfactory result as regards some of the creditors affected, from the point of view of abstract justice.

At an early period after its passing, the question as to the rights of execution creditors, some of whose writs were prior, and some subsequent to specific mortgages or charges upon the property subject to execution was under consideration. The result of the decisions in *Roach v. McLachlan* (1892), 19 A.R. 496; and *Breithaupt v. Marr* (1893), 20 A.R. 689 was to affirm the priority of execution creditors, whose writs were prior to such charges over the writs of creditors which were subsequent thereto. The Legislature six years afterwards in the year 1899, by 62 Vict. (2), c. 11, s. 13 (which is now in substance s. 33 (11) of the present Creditors Relief Act) made an express provision on the subject by way of amendment to the Act. It can hardly be said therefore that the cases above referred to are authorities for the construction of the Act in its present form. The subsection 11 in the present Act is as follows: "11. Where a debtor has executed a mortgage or other charge, otherwise valid, upon his property or any part thereof after the receipt of an execution by the sheriff, and before distribution, such mortgage or charge shall not prevent the sheriff from selling the property under any execution or certificate placed in his hands before distribution, as if such mortgage or charge had not been given, nor prevent creditors whose executions or certificates are subsequent thereto from sharing in the distribution; but in distributing the money realized from the sale of such property the sheriff shall deduct and pay to the person entitled thereto the amount which would otherwise be payable out of the proceeds of such property to the subsequent creditors."

The effect of this provision appears to be that the sheriff is to sell as if no such subsequent mortgages had been made, and he is to declare a dividend on the gross proceeds in favour of all creditors and notwithstanding that some executions are prior and some subsequent to the mortgages, it would seem to be intended that the dividend should be an equal dividend on all creditor's claims, but the dividends applicable to the claims subsequent to the mortgages are to be applied as far as may be necessary in the payment of the mortgages prior to such claims.

This may not be, and probably is not, a satisfactory method of dealing with such claims, nevertheless it is at present the law, and the proper way of dealing with any anomalies it occasions would appear to be by Legislative amendment of the provision.

As far as the claims of creditors and incumbrancers were concerned in the case in question, whether the sale was effected by the sheriff, or the Master, their rights were the same, and it does not appear to be a tenable proposition to say that the mode of sale can in any way affect them; whatever the rights of the parties were if the sale had been made by the sheriff, they were no otherwise though the court for the more convenient disposition of the case saw fit to direct the sale of the land to be made by its own immediate officer; and we do not understand on what principle the learned Chancellor acted when he refused to give effect to the provisions of the above mentioned section.

The scheme which s. 34 appears to provide is this, the gross proceeds of the property sold is to be taken and equally apportioned among all the creditors, and any prior mortgages are to be paid out of the dividend allottable to subsequent executions. Applying that principle it would result as follows, assuming the amounts realized and the amounts of the claims were as follows:—

| | Claims. |
|----------------------------------|---------|
| A. Prior Execution creditors.... | \$1,000 |
| B. Subsequent mortgage | 200 |
| C. " creditors | 500 |
| D. " mortgage | 1,300 |
| E. " creditors | 1,500 |

Let us assume that the gross amount realized by the property, subject to execution is \$1,500. This would yield a dividend of 50c. in the \$ on the aggregate creditor's claims and the \$1,500 would according to the scheme of s. 34 be payable as follows:—

| | | | |
|----------|----------------------------------|-------------------|-------|
| Class A. | whose claim is \$1,000 | would receive.. | \$500 |
| “ B. | “ “ 200 | “ “ | 200 |
| “ C. | “ “ 500 | “ “ | 50 |
| | and also \$200 from E's dividend | | 200 |
| “ D. | “ “ \$1,300 | would receive.... | 550 |
| “ E. | “ “ 1,500 | “ “ | nil. |

With this may be contrasted the method of distribution sanctioned in the case above referred to.

| | | |
|----------|-----------------------|-------------|
| Class A. | would be paid in full | \$1,000 |
| “ B. | “ “ | on a/c. 300 |
| “ C. | “ “ | on a/c. 300 |

Classes D. and E. would get nothing.

It will thus be seen that there is a wide divergence in the result between the scheme laid down in the Creditor's Relief Act and that sanctioned by the court.

Neither the scheme laid down in the Act, nor that sanctioned by the learned Chancellor appears really to carry out what may be regarded as the fundamental principle of the Act, namely the equalization of the rights of execution creditors.

A more likely method of effectuating that end would have been to have required the amount realizable under all executions in the sheriff's hands to be pooled, and then divided ratably among all creditors.

This on the above basis of claims and assuming the amount realized is \$1,700, would work out as follows:—

| | Claims. | Am't. realized. |
|--------------------------|---------|-----------------|
| Class A. creditors | \$1,000 | \$1,000 |
| “ B. mortgage | 200 | 200 |
| “ C. creditors | 500 | 500 |
| “ D. mortgage | 1,300 | nil. |
| “ E. creditors | 1,500 | nil. |

The total amount realized for execution creditors on this plan is \$1,500 but though it is realized under the executions of A. and C. it would nevertheless be divisible between all creditors, including Class E.; and the result would be that Class A. would get \$500; Class C. \$250 and Class E. \$750. All creditors would share equally, which we take it is the real object and intention of the Act to secure and at the same time no mortgagee would get any undue advantage under the Act as it at present stands, the mere intervention of a mortgage may have the effect of giving an execution creditor a priority over other creditors which the Act intended apparently to prevent, but has failed to accomplish.

It would seem as if the Act needed further amendment.

REPORT OF COMMISSION AS TO GERMAN ATROCITIES.

The ghastly record of German atrocities contained in the report of the committee presided over by Lord Bryce puts it beyond all doubt that most of the acts of savagery committed were part and parcel of an organised system, and were carried out under the orders of the high German military authorities. The committee find as proved:—

“That there were in many parts of Belgium deliberate and systematically organised massacres of the civil population, accompanied by many isolated murders and other outrages.

“That in the conduct of the war generally innocent civilians, both men and women, were murdered in large numbers, women violated, and children murdered.

“That looting, house burning, and the wanton destruction of property were ordered and countenanced by the officers of the German army; that elaborate provision had been made for systematic incendiarism at the very outbreak of the war; and that the burnings and destruction were frequent where no military necessity could be alleged, being indeed part of a system of general terrorisation.

"That the rules and usages of war were frequently broken, particularly by the using of civilians, including women and children, as a shield for advancing forces exposed to fire, to a less degree by killing the wounded and prisoners, and in the frequent abuse of the Red Cross and the White Flag."

Many of us may have been disposed to consider a good proportion of the charges that had been made to be unthinkable, unbelievable; but one has only to glance at the evidence upon which the report is based to see that such evidence does not merely support the conclusions, but is overwhelming.—*Law Times*.

INTERNATIONAL LAW AND SUBMARINE WARFARE.

The note sent by the President of the United States to Germany on the question of International Law as touching the lives and property of American citizens thus speaks of the difficulty arising from the use of submarine warships: "The Government of the United States therefore desires to call the attention of the Imperial German Government with the utmost earnestness to the fact that the objection to their present method of attack against the trade of their enemies lies in the practical impossibility of employing submarines in the destruction of commerce without disregarding those rules of fairness, reason, justice and humanity which all modern opinion regards as imperative. It is practically impossible for officers of submarines to visit a merchantman at sea and examine her papers and cargo. It is practically impossible for them to make a prize of her, and if they cannot put a prize crew on board they cannot sink her without leaving her crew and all on board her to the mercy of the sea in her small boats." International law, after this war is over, will be as much shreds and patches as Germany's broken treaties.

REVIEW OF CURRENT ENGLISH CASES.

BREACH OF TRUST—BANK ACCOUNT—PAYMENT OF TRUST MONEY INTO PRIVATE ACCOUNT—PAYMENTS OUT—BALANCE AT CREDIT OF ACCOUNT LESS THAN TRUST FUND—SUBSEQUENT INCREASE OF BALANCE—FOLLOWING TRUST FUND.

Roscoe v. Winder (1915) 1 Ch. 62. In this case one William Wingham purchased the assets of the plaintiff company. He agreed to collect and pay over to the company the book debts due to the company at the time of the sale. He did collect debts to the amount of £623 8s. 5d. He paid no part of this sum to the company, but paid into his private bank account £455 18s. 11d., part of the amount so collected. He subsequently drew against this account for his private purposes, and reduced the balance to £25 18s. Wingham died bankrupt, and a trustee was then appointed of his estate. At the time of his death a balance of £358 5s. 5d. stood to the credit of his bank account. The plaintiff company contended that the whole of this sum was impressed with a trust in the plaintiff's favour; that the payments into the account should be deemed to have been made by the deceased to make good *pro tanto* the trust moneys which he had misapplied. But Sargant, J., held that there was no such presumption, and that the only part of the balance which was ear-marked as the plaintiff's fund was the £25 18s.

BUILDING SOCIETY—OFFICIAL RECEIVER—LIQUIDATOR—CREDITORS—DIVIDENDS PAID UNDER JUDGMENT SUBSEQUENTLY VARIED IN APPEAL—PAYMENT BY MISTAKE OF LAW—REFUNDING OVER-PAYMENT—MISTAKE OF COURT.

In re Birkbeck Permanent Building Society (1915) 1 Ch. 91. This was a winding-up proceeding in which by the judgment of Neville, J., affirmed by the Court of Appeal, certain shareholders were declared to be entitled to be paid in full in priority to other shareholders, and were accordingly so paid by the official receiver who was the liquidator, before he was notified of any appeal to the House of Lords. Subsequently the decision of the Court of Appeal was varied, and all shareholders were declared to be entitled to rank *pari passu*. This was an application by the liquidator to compel the shareholders who had thus been overpaid to refund the amount of the overpayment. Neville, J., held that the official receiver, being an officer of the Court, the overpayment in question was a mistake of the Court, and that it should be refunded, and he so ordered.

VENDOR AND PURCHASER—PROPERTY SUBJECT TO CHARGE—RIGHT OF TRUSTEE TO RELEASE PART OF PROPERTY SUBJECT TO A CHARGE ON RECEIPT OF WHOLE OF PURCHASE MONEY.

In re Morell & Chapman (1915) 1 Ch. 162. The simple question in this case was whether a trustee could validly release a part of property subject to a charge on receipt of the whole of the purchase money. The facts were that a testator had bequeathed a leasehold estate to his sons, G. M. Morrell and A. R. Morrell, subject to a charge thereon of two legacies of £5,000 each to G. M. Morrell and A. R. Morrell, in trust for his daughters. A. R. Morrell had died and appointed G. M. Morrell and C. W. Whitworth his executors. G. M. Morrell individually and as executor of his brother's estate, together with Whitworth, his co-executor, contracted to sell the leasehold, and the question was whether G. M. Morrell, as surviving trustee of the legacies, could give an effective release of the property from the charge, and Eve, J., held that, on receipt of the whole of the purchase money therefor, he could, although it was not sufficient to satisfy the whole amount due in respect of the legacies.

PRACTICE—SOLICITOR—ACTION BY INFANT BY NEXT FRIEND WHO WAS ALSO AN INFANT—SETTING ASIDE WRIT—PERSONAL LIABILITY OF SOLICITOR FOR COSTS.

Fernée v. Gorlitz (1915) 1 Ch. 177. This was an application by the defendants to set aside a writ of summons and service on the ground that the action was by an infant by a next friend who was also an infant. Two of the defendants were the infant's parents, and one of them had suggested the person named as next friend for the plaintiff, and the plaintiff's solicitor had acted on this suggestion. Eve, J., though setting aside the writ and service and ordering the plaintiff's solicitor personally to pay the costs of the defendant Gorlitz, gave no costs to the plaintiff's parents, who for some time after the issue of the writ had been represented by the plaintiff's solicitor.

SOLICITOR AND CLIENT—CHANGE OF SOLICITOR—SCHEDULE OF DOCUMENTS HANDED OVER TO NEW SOLICITOR—COSTS.

In re Morgan (1915) 1 Ch. 182. The only point in this case which need be noticed is that Neville, J., decided that, where there is a change of solicitor, the old solicitor is entitled to charge for a schedule of the documents which he hands over to the new solicitor.

DONATIO MORTIS CAUSA—BONDS PAYABLE TO BEARER—BOX AT
BANK—DELIVERY OF KEY TO DONEE.

In re Wasserberg, Union of London and Smith's Bank v. Wasserberg (1915) 1 Ch. 195. The validity of a *donatio mortis causa* was in question in this case. The donor, being about to undergo a serious surgical operation and being possessed of certain bonds, payable to bearer, which were in the custody of a bank, which he desired to give to his wife; he discussed the matter with the assistant manager, to whom he ultimately expressed his intention of putting his wife's name on the outside of the parcel of bonds. He visited the bank with his wife, and put the bonds in a sealed parcel and put his wife's name thereon; put them in a locked box, of which he took the key, the box being left in the custody of the bank. He subsequently gave her a list of the bonds and a bunch of keys, on which was the key of the box containing the bonds, and told her to lock them up with the list of the bonds, which she did, in a drawer of her own room, of which she kept the key. The same day the donor went to a nursing home and remained there till he died, four days afterwards. Sargant, J., held that these facts constituted a good *donatio mortis causa* of the bonds.

HIGHWAY—NUISANCE—QUARRY ON LAND ADJOINING HIGHWAY—
COLLAPSE OF FENCE AND ROAD—DUTY OF PRESENT OCCUPIER
OF QUARRY TO FENCE.

Attorney-General v. Roe (1915) 1 Ch. 235 may here be briefly noted for the fact that Sargant, J., decided that where a quarry was opened beside a highway and the then owner of the quarry had erected a wall to protect passers-by from danger from the excavation, on a subsequent collapse of the wall and consequent subsidence of the highway it is the common law duty of the occupier of the quarry to restore the fence and roadway to its former condition, and that this duty does not depend on whether the excavation was made before or after his occupation began, or upon whether or not he was under any liability to his landlord, if any. He holds that the occupier of land adjoining a highway is not only bound to fence, but to support and retain the soil of the highway.

WAR — ALIEN ENEMY — FOREIGN INSURANCE COMPANY WITH
BRANCH OFFICE IN ENGLAND—TRADING WITH ENEMY—PRO-
CLAMATION OF OCTOBER 8, 1914.

Ingle v. Mannheim Insce. Co. (1915) 1 K.B. 227. By the

Royal Proclamation of October 8, 1914, it was declared that where an enemy has a branch locally situated in British territory, transactions with such branch shall be considered as transactions by or with an enemy. Prior to the proclamation, the plaintiff had insured with the defendant company (a German insurance company), which had a branch in England, and a loss had occurred under such policy prior to October 8, 1914, to recover for which the action was brought. The defendants contended that the right of action was suspended during the war, but Bailhache, J., held that carrying on business with the defendants' branch in England was not (apart from the proclamation of October 8, 1914) a trading with an enemy, and that the proclamation was not retrospective, and that the right of action having accrued before the proclamation was made, the action could still be maintained, notwithstanding the proclamation.

SALE OF GOODS—PERFORMANCE—APPROPRIATION OF CARGO TO CONTRACT—APPROPRIATION MADE AFTER NOTICE TO VENDOR OF LOSS OF CARGO—TENDER AFTER LOSS—CLAUSE AVOIDING CONTRACT IN CASE GOODS SHIPPED DO NOT ARRIVE.

Re Olympia Oil Cake Co. v. The Produce Brokers (1915) 1 K.B. 233. This was a special case on certain points of law. The facts were that a contract for the sale of 6,000 tons of beans was made by the Produce Brokers with the Olympia Oil Cake Co., which provided that "particulars of shipment . . . to be declared by original sellers not later than 40 days from the date of the last bill of lading. . . . In case of resales, copy of original appropriation shall be accepted by buyers and passed on without delay. . . ." Clause 10 provided that "this contract is to be void as regards any portion shipped that may not arrive by the ship or ships declared against the contract." The Produce Brokers had in September, 1912, purchased from the East Asiatic Company, under a similar contract, 6,000 tons of beans. On February 4, 1913, the Produce Brokers received a declaration and appropriation of a cargo of beans for the *Canterbury*, which was stated to have sailed from Vladivostock on January 31. On the same day the Produce Brokers received information that the *Canterbury* had been lost at sea, and, after having received this information, they declared and appropriated the shipment by that vessel to the contract with the Olympia Co. The question for the Court was whether, after the knowledge of the loss of the vessel and cargo, they could make a valid appropriation of it to their contract with the Olympia; and (2) whether they were

entitled to the benefit of the clause relating to resales so as to entitle them, notwithstanding the loss, to require the Olympia to accept the appropriation made by the East Asiatic Co.; and (3) whether they were entitled to treat the contract as avoided under clause 10. The Court (Avory, Rowlatt and Shearman, JJ.) answered all the questions in the negative, the Court holding that the Produce Brokers could not make a valid tender or appropriation of a cargo they knew to be lost, and that, as there was no valid appropriation, there was no shipment in fact to which clause 10 could apply.

SOLICITOR AND CLIENT—STATUTE-BARRED COSTS—ACKNOWLEDGMENT OF DEBT BY CLIENT—ABSENCE OF INDEPENDENT ADVICE—PRESUMPTION OF UNDUE INFLUENCE.

Lloyd v. Coote (1915) 1 K.B. 242 is a case which illustrates the jealousy with which the law safeguards the relationship of solicitor and client, in order to prevent it from being made the means whereby a solicitor gains any benefit for himself to his client's detriment. The plaintiff was the executrix of her deceased husband's estate, and the defendant was her solicitor, and had been the solicitor of her deceased husband. He presented to the plaintiff a bill of costs against the deceased, which included many items which were statute-barred, and, without having any independent advice, she, at his request, signed a written acknowledgment of the debt. In her affidavit to obtain probate, prepared by the defendant, this debt was included as a debt due by the estate. The present action was brought for an account, and the two questions discussed are whether an acknowledgment obtained in such circumstances could be relied on by the defendant, and whether the statement in the affidavit for probate was a sufficient acknowledgment. The Divisional Court (Horridge and Rowlatt, JJ.) negatived both questions, the Court being of opinion that in such transactions, where a benefit results to the solicitor, there is a presumption of undue influence, which cannot be rebutted by any evidence. Rowlatt, J., however, is careful to say that in case of a voluntary acknowledgment or payment by the client in respect of a statute-barred debt, the solicitor might be entitled to rely on it. At all events, this case does not decide that he could not.

COSTS—TAXATION AS BETWEEN SOLICITOR AND CLIENT.

Giles v. Randall (1915) 1 K.B. 290. This action was compromised and the defendant agreed to pay the plaintiff's costs as

between solicitor and client. On the taxation the taxing officer disallowed certain items which might have been taxable between solicitor and client, but which he held were not taxable when the costs were to be paid by a third party, and certified that where a third party is to pay the costs on a taxation as between solicitor and client, very little more is taxable than on a taxation between party and party. The Court of Appeal held that the taxing officer had proceeded on a right principle, the Court not interfering on a question of quantum.

SHIP—CHARTER PARTY—SALE OF SHIP AND RIGHT UNDER CHARTER PARTY—REFUSAL OF CHARTERER TO LOAD SHIP.

Fratelli Sorentino v. Buerger (1915) 1 K.B. 307. A simple question was involved in this case. The plaintiffs, the owners of a ship, entered into a charter party with the defendants, under which the vessel was to proceed to Odessa and receive a cargo. Before the vessel proceeded to Odessa, the plaintiffs sold her to a company, with the benefit of the charter party. The vessel proceeded in due course to Odessa, but the defendants, the charterers, refused to load the vessel, on the ground, as they contended, that the plaintiffs had ceased to be able to perform the contract. On a case stated by an arbitrator, who had found in favour of the plaintiffs, subject to their producing a consent or release from their vendees, Atkin, J., held that the contract was not one which could not be assigned, and that the sale did not prevent the plaintiffs, through the purchasers, performing their part of the contract. He, therefore, held that the award in favour of the plaintiffs must stand.

SALE OF GOODS—C.I.F. CONTRACT—PAYMENT AGAINST SHIPPING DOCUMENTS—"WAR RISK FOR BUYERS' ACCOUNT"—TENDER OF DOCUMENTS.

Groom v. Barber (1915) 1 K.B. 316. This is a case arising on a c.i.f. contract. The goods in question were bought in England to be shipped from Calcutta to England under a c.i.f. contract, which contained the clause "war risk for buyers' account." The goods were duly shipped on the steamship *City of Winchester* at Calcutta, and insured, except against war risks. The vessel was captured by a German cruiser and sunk on August 6. On August 20 the seller received information as to the name of the steamer on which the goods had been shipped in the shape of an invoice, which was on the same day forwarded to the buyers.

On August 21 the news of the loss of the vessel arrived in England. On August 22 the buyers returned the invoice, stating that they had previously asked for the name of the steamer, and, as the seller's invoice received the previous day gave the first information on that point, they refused to accept any responsibility in the matter. The matter having been referred to arbitration, the arbitrator made an award in favour of the seller, which was affirmed by the Appeal Committee, and the buyers, therefore, appealed from the award, and Atkin, J., held that the words "War risk for buyers' account" did not mean, as the buyers contended, that the seller was to insure against war risk, and charge the cost to the buyers, but that the buyers themselves had to take the necessary steps to protect themselves from such risks, and that under the contract the seller, in tendering the bill of lading and policy of insurance in usual form, was entitled to payment of the price, and that the loss of the goods in the meantime by risks not insured against did not militate against his right to payment.

CRIMINAL LAW—OBTAINING GOODS BY FALSE PRETENCES—OBTAINING CREDIT BY FALSE PRETENCES—PROCEDURE ON INDICTMENT CONTAINING COUNTS FOR SEPARATE OFFENCES.

The King v. Norman (1915) 1 K.B. 341. This was an appeal from a conviction on charges of obtaining goods, and credit, on false pretences. The prisoner was given in charge on the whole indictment, and there was no direction to the jury as to the difference between the offences charged, and they brought in a general verdict of guilty. The Court of Criminal Appeal (Darling, Lush and Atkin, JJ.) held that, in the circumstances, the verdict of guilty should be taken to apply only to the lesser offence of obtaining credit by false pretences, and they reduced the sentence from five years' penal servitude to twelve months' hard labour, which is the maximum sentence for the lesser offence. The Court also express the opinion that, where separate offences are charged, the accused in such a case ought to be tried on one count at a time, and not upon all at the same time.

SHOPS—AUTOMATIC MACHINE AT SHOP DOOR—CLOSING SHOP FOR SERVING CUSTOMERS—TRADING ELSEWHERE THAN IN SHOP.

Willesden District Council v. Morgan (1915) 1 K.B. 349. This was a prosecution for contravention of a statute (2 Geo. 5.c. 3) which provides, "Every shop shall, save as otherwise provided by this Act, be closed for the serving of customers not later than

one o'clock in the afternoon on one week day in every week," and which also provides "It shall not be lawful in any locality to carry on in any place not being a shop retail trade or business of any class at any time when it would be unlawful to keep a shop open for the purposes of retail trade or business. . . ." The defendant kept a shop for carrying on business as a dairyman. He closed his shop, but at its door he placed an automatic machine, attached to a reservoir of milk within the shop, whereby persons could obtain milk by depositing money in a slot. The Justices were of the opinion that this did not constitute an infraction of the above-mentioned provisions, and the Divisional Court (Ridley, Avory and Lush, JJ.) were of the same opinion. The shop was closed for serving of customers, and at the same time business was not carried on elsewhere than in a shop, because the milk reservoir was in the shop.

SOLICITOR—COSTS—AGREEMENT WITH CLIENT—SETTING ASIDE AGREEMENT AS TO COSTS—"UNFAIR AND UNREASONABLE"—COLLECTION OF DEBT DUE TO CLIENT—APPROPRIATION TO PAYMENT OF COSTS—PAYMENT—TAXATION—SOLICITORS ACT, 1870 (33-34 Vict. c. 28), ss. 4, 8, 9, 10—(R.S.O., c. 159, ss. 42-49).

In re Jackson (1915) 1 K.B. 371. In this case the validity of an agreement between a solicitor and his client as to costs was under consideration. The client retained the solicitor to defend him on a charge of embezzlement, and also to defend him in a civil action. The retainer was dated June 14, 1912, and thereby the client agreed that the solicitor should receive the proceeds of the sale of certain furniture "to cover" the charges for the defence in the criminal proceedings. The solicitor received these proceeds. The retainer also provided that the solicitor should conduct the defence in the civil proceedings for an inclusive fee of 100 guineas. On June 21, 1912, the solicitor received £100, amount of a debt due to his client, which he claimed was a payment of his costs in the civil proceedings. On October 28, 1912, the client pleaded guilty to the criminal charge, and was sentenced to penal servitude. On October 1, 1912, he had assigned all his real and personal estate to the liquidator of a company which had formerly employed him. The applicant in this proceeding was an administrator of the convict's estate, appointed under a statute in that behalf, and he, on the 20th February, 1914, made a summary application against the solicitor to set aside the agreement, and for delivery and taxation of

a bill pending the proceedings. On the 4th April, 1914, the liquidator assigned the client's estate to the applicant. The solicitor contended that the costs had been paid more than a year before the application, and therefore it was barred. The Master made the order as asked, but, on appeal, Aitken, J., reversed the order on the ground that the application was too late. The Divisional Court (Horridge and Rowlatt, JJ.) over-ruled that objection, and held that the agreement as to the proceeds of the furniture was not an agreement respecting "the amount and manner of payment" within s. 4 of the Solicitors Act, 1870 (see R.S.O., c. 159, s. 49), because it did not fix the amount of the costs, but merely provided that the proceeds were "to cover" them, which should be construed as merely providing a fund for the payment thereof, whatever the amount might be, but not that the costs were necessarily to be as much as the proceeds. The Divisional Court, therefore, held that the Master was right in ordering the delivery of a bill and taxation of those costs. With regard to the question as to whether there had been a payment of the costs of the civil proceedings, they referred it back to the Master to make further inquiry as to whether what had taken place amounted to "payment," intimating that the mere receipt of the money by the solicitor would not necessarily amount to a payment, unless it was shewn that it was so received and so applied as payment with the client's consent. The payment of £100 in respect of a debt of £105 would *prima facie* be only a payment on account, and not such a "payment" as would preclude taxation. The Divisional Court also held that, although the applicant might not have had a good title to apply when the proceedings were instituted, he might, nevertheless, rely on his subsequent acquisition of title under the assignment from the liquidator.

PUBLIC AUTHORITIES PROTECTION—LIMITATION OF TIME FOR BRINGING ACTION—ACTION FOR DAMAGES—STATUTORY DUTY OR AUTHORITY—VOLUNTARY CONTRACT—PUBLIC AUTHORITIES PROTECTION ACT, 1893 (56-57 VICT. c. 61), s. 1—(R.S.O., c. 89, s. 13 (1)).

Myers v. Bradford (1915) 1 K.B. 417. The defendants were authorized to manufacture and sell gas and coke. They contracted to sell coke to the plaintiff, and, in the course of delivering it, their servant injured the plaintiff's premises, and the action was brought to recover for the damages so occasioned. The injury complained of took place more than six months prior to the com-

mencement of the action, and it was objected that it was, consequently, barred under the Public Authorities Protection Act, 1893 (56-57 Vict. c. 61), s. 1 (R.S.O., c. 89, s. 13), which requires that actions against any public authority for anything done in the execution of its statutory duty or authority shall be brought within six months from the commission of the act complained of. The Court of Appeal overruled the objection, holding that, though the coke was sold under a statutory authority, yet the act being done in the execution of a voluntary contract, and not in the execution of any public duty or authority, it was not within the Act, which, therefore, afforded no defence.

DISTRESS—RENT—EXEMPTION—GOODS OF STRANGER —“GOODS COMPRISED IN HIRE-PURCHASE AGREEMENT” —LAW OF DISTRESS AMENDMENT ACT, 1908 (8 EDW. 7, c 53), s. 4—(R.S.O. c. 155, s. 31).

Jay's v. Brand (1915) 1 K.B. 458. In this case the Court of Appeal (Buckley, Phillimore and Pickford, L.JJ.) have affirmed the decision of the Divisional Court (1914), 2 K.B. 132 (noted *ante*, vol. 50, p. 342). The action was for illegal distress. The goods distrained consisted of furniture leased by the plaintiffs to one Bray, the tenant of the defendant, under a hire-purchase agreement, which provided, "If the hirer does not duly observe and perform the agreement, the same shall *ipso facto* be determined, and the hirer shall forthwith return the goods to the owners, and the owners shall be entitled to retake possession of the same as being goods wrongfully detained by the hirer, and for that purpose to enter on any premises where the goods may be." Bray, becoming in default for rent of the goods, the plaintiffs served on him a notice terminating the agreement, and endeavoured unsuccessfully to retake possession of the goods. The next day the defendant, the landlord, distrained the goods for rent, which the plaintiff claimed was unlawful, because, before the distress, they had terminated the agreement, but the Divisional Court held that, notwithstanding the notice, the agreement was still subsisting, as under it the plaintiffs were empowered to retake the goods, and, therefore, in law the goods were still comprised in the hire-purchase agreement and liable to distress.

CRIMINAL LAW—TRIAL—JURYMAN SEPARATED FROM COLLEAGUES AFTER JUDGE'S CHARGE—EFFECT ON TRIAL.

In *The King v. Ketteridge* (1915), 1 K.B. 467, which was a criminal case, one of the juryman, after the Judge's charge, got

separated from the rest of the jury, and was in a position to converse with other persons, he having left the building where the trial was held, and been absent a quarter of an hour, through some misunderstanding of what he was intended to do, and it was held by the Court of Criminal Appeal (Darling, Lush and Atkin, JJ.) that this rendered the whole proceedings abortive, and that the conviction of the prisoner must be quashed.

CRIMINAL LAW — PLEA OF GUILTY — MISAPPREHENSION OF PRISONER AS TO MEANING OF INDICTMENT—ABSENCE OF FELONIOUS INTENT—PLEA OF "GUILTY" WRONGLY ENTERED.

The King v. Ingleson (1915) 1 K.B. 512. In this case the defendant was indicted for stealing horses, and also for receiving, knowing them to be stolen. The prisoner pleaded "Guilty," and, on being asked whether he had anything to say why sentence should not be pronounced, he said that he was guilty of taking the horses not knowing they were stolen. He was then sentenced. On an appeal by the prisoner, the Court of Criminal Appeal (Coleridge, Rowlatt and Shearman, JJ.) held that, in the circumstances, the plea of guilty ought not to have been entered, and it was ordered to be struck out, and all subsequent proceedings were set aside, and a plea of "not guilty" was ordered to be entered, and the case was remitted for trial, on the ground that the prisoner had clearly thought that he was guilty though he had no felonious intent to steal.

CRIMINAL LAW—BEGGING IN STREET—VAGRANCY ACT, 1824 (5 GEO. 4 c. 83), s. 3—(CR. CODE, s. 238 (d)).

Mathers v. Penfold (1914) 1 K.B. 514. This was a prosecution for begging in the street, contrary to the Vagrancy Act (5 Geo. 4 c. 83), s. 3 (see Cr. Code, s. 238 (d)). The defendant was a member of a trade union, and, owing to a trade dispute, was out of work. The union organized a collection of funds to relieve their members who were out of work and their families, and, in order to check the collectors, tickets were authorized to be issued and offered for sale. The accused had accosted persons on the street, asking them to buy some of these tickets, and also to assist him as he was out of work owing to a strike. In no case did any of the persons solicited buy any of the tickets or give him any money. The moneys collected from the sale of the tickets were divided between certain members of the union out of work and their families, irrespective of the fact that some had collected and others had not. The magistrate acquitted the

accused, but stated a case, in order that it might be considered whether *Pointon v. Hill*, 12 Q.B.D. 306, should be reviewed. The Divisional Court (Darling, Bankes, Avory, and Lush, JJ.) were of the opinion that the case was not within the Act, which they considered did not apply to persons soliciting for a charitable object in which they themselves might have an interest, but was directed against idle persons who had taken up or apparently intended to take up begging as an occupation and means of living. The Court thought that *Pointon v. Hill* had been well decided.

ADULTERATION OF FOOD—COFFEE MIXED WITH CHICORY—PRINTED NOTICE ON PACKAGE—SALE OF FOOD AND DRUGS ACT, 1875 (38-39 VICT. c. 63), ss. 6, 8—(R.S.C. c. 133, s. 24 (a)).

Clifford v. Batley (1915) 1 K.B. 531. This was a prosecution under the Adulteration Act, 1875, 38 & 39 Vict. c. 63, ss. 6, 8 (R.S.C. c. 133, s. 24 (a)). The facts were that the prosecutor went to the shop of the defendant, a grocer, and requested him to sell to him a number of articles, including $\frac{1}{2}$ lb. of coffee. The articles were supplied in separate packages, wrapped together in one parcel, for the convenience of the prosecutor in carrying them away. On reaching home he discovered that the package containing the coffee had on it a printed label stating, "This is sold as a mixture of coffee and chicory." The prosecutor did not see nor did he have any opportunity of seeing this label before he left the defendant's shop. The coffee contained 22 per cent. of chicory. The admixture was not excessive and was not intended fraudulently to increase the bulk, weight or measure of the article sold, nor to conceal its inferior quality, and it is a usual and well-known practice to mix chicory with coffee and sell it in a wrapper bearing the words used in the present case. The Divisional Court (Darling, Bankes, Lush and Atkin, JJ., Avory, J., dissenting) held that this constituted no breach of the Act, and that it was not necessary that express notice of the mixture should have been given at the time of sale. Darling, J., observed that he entirely agreed with the reasoning of Rowlatt, J., in *Batchelor v. Gee* (1914), 3 K.B. 242, which, however, he thought ought to have led to exactly the opposite conclusion at which the learned Judge arrived.

NEGLIGENCE—RAILWAY COMPANY—OMISSION TO FENCE BANK IN YARD—DUTY TO PERSONS COMING ON PREMISES FOR BUSINESS—STATION YARD—OPEN CULVERT—HORSE AND CART UN-ATTENDED.

In *Norman v. Great Western Ry.* (1915) 1 K.B. 584, the Court of Appeal (Buckley, Phillimore and Pickford, L.JJ.) have over-

ruled the decision of the Divisional Court (1914), 2 K.B. 153 (noted *ante*, vol. 50, p. 343). The facts were that the plaintiff was in the habit of going with his horse and cart to the defendants' station yard, to receive or deliver goods. The yard was bounded on one side by a sloping bank, at the bottom of which was an open culvert. This bank was not protected by a fence. On the occasion in question the plaintiff left his horse and cart unattended, as he had been accustomed to do, at the door of the weigh-house, while he went inside to transact business. The cart was about 40 feet away from the bank. The horse backed the cart and was ultimately dragged over the bank into the culvert, and horse and cart were injured. The judge of the County Court held that the defendants were liable; the Divisional Court was divided in opinion. The Court of Appeal held that there was no evidence of any breach of duty on the part of the railway company causing the accident, and that the action must be dismissed. Their Lordships were of the opinion that the absence of the fence was not the cause of the accident, but rather the absence of the driver.

**FALSE IMPRISONMENT—MINER IN COAL MINE—REFUSAL TO WORK
—REFUSAL OF EMPLOYERS TO AFFORD WORKMAN FACILITY FOR
LEAVING MINE.**

Herd v. Weardale Steel C. and C. Co. (1915) A.C. 67. This was an action by a miner against his employers to recover damages for alleged false imprisonment. The facts, briefly, were as follows:—The plaintiff descended the defendants' mine at 9.30 a.m., and, when there, wrongfully refused to work. At 11 a.m. he demanded to be raised to the surface in a lift, which was the only means of egress from the mine, and was refused facilities therefor until 1.30 p.m., although the lift had been available for carriage of men to the surface at 1.10 p.m. In the ordinary course of business he would not have been entitled to be raised to the surface until 4 p.m., at the conclusion of his shift. The plaintiff claimed that this refusal to raise him to the surface between 1.10 and 1.30 p.m. was an illegal detention. The House of Lords (Lord Haldane, L.C., and Lords Shaw, and Moulton), affirming the Court of Appeal (1913), 3 K.B. 771, decided that it was not, and that the plaintiff had no cause of action. Their Lordships were of the opinion that the maxim, *volenti non fit injuria*, applied, and that the plaintiff had no right to be raised until the end of his shift, and that there was no obligation on the part of the defendants to afford him egress from the mine at any

other time, except at their own discretion, except in case of sudden illness or injury, when there would be an implied obligation to bring him to the surface without delay.

CONTRACT—PENALTY OR LIQUIDATED DAMAGES.

Dunlop Pneumatic Tyre Co. v. New Garage and M. Co. (1915) A.C. 79. The plaintiffs entered into an agreement with the defendants, in consideration of their being supplied with goods of the plaintiffs' manufacture (being tires, covers and tubes for automobiles), (1) that they would not alter or remove the plaintiffs' trade marks; (2) that they would not sell or offer for sale such goods below the prices named in plaintiffs' price list; (3) nor supply such goods to persons the plaintiffs should forbid or exhibit goods of plaintiffs' manufacture at any exhibition without the plaintiffs' consent; (4) or export goods of plaintiffs' manufacture without plaintiffs' consent; (5) that defendants would pay £5 by way of liquidated damages for every tyre cover or tube sold in breach of the agreement. The question in the case was whether this payment of £5 was to be construed as a penalty or as liquidated damages. The Court of Appeal decided that it was a penalty merely; the House of Lords (Lords Dunedin, Atkinson, Parker, Waddington and Parmoor) have reversed that decision, and hold that it was liquidated damages. In Lord Dunedin's judgment, on pages 86-88, will be found a useful summary of the principles on which the Court proceeds in such cases.

Correspondence

MARRIAGE—PROHIBITED DEGREES.

To the Editor, CANADA LAW JOURNAL:

SIR,—Mr. Raney is again mistaken in his letter in your issue of April last on p. 153. He says he intended to have referred to 25 Hen. 8 c. 22. But that Act, on its face, shews that the "Divorce" had taken place, and also Henry's marriage with Ann Boleyn, before the Act was passed. It merely gave a Parliamentary sanction to something which had already been done. Mr. Raney suggests that the judgment of the Ecclesiastical Court was void and that Cranmer had no jurisdiction; apparently forgetting that by 24 Hen. 8 c. 12 appeals to Rome had been abolished, and, therefore, the Pope's judgment really had no legal validity. But all this is really beside the mark; my substantial objection to Mr. Raney's remarks is that he seeks, as I think without any ground, to throw discredit on "the prohibited degrees" as established by Henry's Parliament. In Martin Luther's statement of things requiring reformation in the Church, put forth in 1520 (see Harvard Classics, vol. 36, p. 325), he included this very question of prohibited degrees, and, if we compare what Henry's Parliament did with the remedy Luther proposed, it will be seen that the former was a far more reasonable and effective remedy. While Mr. Raney seems to discredit that remedy, it will be noted he does not suggest any better.

He professes to be bewildered by divergent views expressed regarding the interpretation which Henry's Parliament place on the Levitical law as regards marriage with a deceased wife's sister and he quotes from one of the judgments in *Rex v. Dibdin*. I might also quote some ridiculous remarks from the same case, but forbear. I agree with Mr. Raney that an argument such as he quotes founded on the fact that the Act legalising marriage with a deceased wife's sister was passed with the advice of the Lords Spiritual, when the Judge must have known that, as a matter of fact, all the Lords Spiritual present at the third reading had voted against the Act, is difficult to understand, and I do not wonder that it bewilders Mr. Raney. But, *per contra*, Lord Coke agrees with the interpretation of Henry's Parliament and that of the Lords Spiritual of King Edward's Parliament (see 2 Inst. p. 683), where he says: "*Quia eandem rationem propin-*

quitatis cum eis qui nominatim prohibantur, et sic de similibus," according to which principle, marriage with a deceased brother's wife being explicitly forbidden, it follows that marriage with a deceased wife's sister is also forbidden.

G. S. H.

As before, it would seem best to let Mr. Raney himself answer the above letter. His reply, which will conclude the discussion, is as follows:—

"It seems to transpire now, as often happens in arguments, that there really is little or nothing substantial in controversy between Mr. Holmsted and myself. He is strong on the prohibited degrees. I have no quarrel with them, at this stage of the discussion at all events, provided they are kept intact. One prohibition, more or less, in the matrimonial line is not perhaps very important. My criticism was intended to be directed to the inconsistency of prohibiting a woman from marrying her deceased husband's brother or her deceased husband's nephew and permitting a man to marry his deceased wife's sister or deceased wife's niece, and incidentally to the motives which, according to my reading of history, actuated the Parliament of Great Britain in the reign of Henry VIII., and afterwards in the reign of William IV., in dealing with the subject. However else Mr. Holmsted and I may differ, we shall at least agree on the desirability of legislation, both in Great Britain and in the Dominions, that will put this subject on such a footing that a son who is an heir in Canada shall not be a son without a father in Great Britain, or *vice versa*. If the discussion in the CANADA LAW JOURNAL should fortunately have the effect of doing something to promote such legislation, a useful purpose will have been served, and that no matter which way the question of the prohibited degrees may be resolved."

And so we leave this subject for the present. Some legislation may be desirable, but whether it is or not, it is unlikely under present conditions.

ED. C.L.J.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT OF CANADA.

QUE.] PRICE v. CHICOUTIMI PULP Co. [March 15.

Libel — Business reputation — Action by incorporated company — Truth of facts alleged — Fair comment — Justification — Public interest — Qualified privilege — Charge to jury — Misdirection — Misleading statements — Practice — Evidence of special damage — New trial.

There being a dispute between the parties as to the ownership of certain lands, the plaintiffs, a commercial corporation, obtained special legislation vesting the lands in question in the company. On becoming aware of this legislation, the defendant published letters in several newspapers accusing the company of obtaining it by political influence and preventing him vindicating his title in the courts. In an action to recover damages for libel, the trial Judge told the jury that the defendant's defence of justification would be established if they were satisfied that, although in fact untrue, the defamatory statements had been made in honest belief of their truth, and that, if the publications were an honest comment on the facts as stated, that, in itself, would be sufficient to establish the defence of fair comment. On the findings of the jury, judgment was entered for the defendant, but this judgment was set aside, on the ground of misdirection, by the judgment appealed from and a new trial ordered.

Held, per curiam, that where damages of a special nature have been suffered in respect of its property or business reputation, a commercial corporation can maintain an action for libel.

Held, per Idington, Duff, Anglin and Brodeur, JJ., Davies, J., dissenting, that the directions by the trial Judge as to the defences of justification and fair comment were erroneous and misleading.

Per Davies, J., dissenting. Taken as a whole, the charge of the trial Judge was clear and explicit and placed the material issues fairly before the jury, and, consequently, the judgment entered at the trial on the findings of the jury ought not to be disturbed.

Per Anglin, J., dissenting. That, as a Judge could not properly rule or a jury reasonably find that the defendant's letters were

calculated to injure the property of the plaintiffs or their business reputation, as a commercial corporation, they could not recover without proof of special damage.

Judgment appealed from, Q.R. 22 K.B. 393, affirmed, Davies and Anglin, JJ., dissenting.

Appeal dismissed with costs; cross-appeal dismissed with costs.

G. G. Stuart, K.C., and L. St. Laurent for the appellant.
E. Belleau, K.C., and A. Taschereau, K.C., for the respondents.

MAN.] *PHELAN v. GRAND TRUNK PACIFIC RY. CO.* [March 15.]

Railways — Operation — Equipment — Coupling apparatus — Duty to provide and maintain — Protection of employees — Inspection — "Inevitable accident" — Negligence — Findings of jury — Evidence — Common employment — Conflict of laws — "Railway Act," R.S.C., 1906, c. 37, s. 264 — Construction of statute vis major.

A car attached to a fast-freight train arrived at a station on the railway, in Saskatchewan, during a cold night in the winter; it was equipped with an approved coupling device, as required by s. 264 (c) of the Railway Act, R.S.C., 1906, c. 37, and, on the arrival of the train, it had been inspected according to the usual practice and no defect was then found. When the train was being moved for the purpose of cutting out the car, the uncoupling mechanism failed to work, and, in consequence, the plaintiff, an employee, received injuries. Subsequently the coupler was taken apart, and it was then discovered that the locking-block was jammed with ice (not visible from the exterior), which had formed inside the chamber and prevented its release by the uncoupling device used to disconnect the car before the train was moved. In an action for damages, instituted in the province of Manitoba, the jury found that the company had been negligent "through lack of proper inspection," and judgment was entered on their verdict. On appeal from the judgment of the Court of Appeal for Manitoba, setting aside the verdict, and entering judgment for the defendants.

Held, per Fitzpatrick, C.J., and Davies and Anglin, JJ. The obligation resting upon the company, both under the statute and at common law, was discharged by the customary inspection of the car which had been made according to what was shewn to be good railway practice, and there was no further duty imposed

in regard to unusual conditions not perceivable by the ordinary methods of inspection.

Per Davies and Anglin, JJ. Viewed as a finding upon a question of fact, the verdict of the jury upon the technical question as to the system of inspection should be set aside as being against evidence. *Jackson v. Grand Trunk Ry. Co.*, 32 Can. S.C.R. 245; *Jones v. Spencer*, 77 L.T. 537; *Metropolitan Asylum District v. Hill*, 47 L.T. 29; *Jackson v. Hyde*, 28 U.C.Q.B. 294; and *Field v. Rutherford*, 29 U.C.C.P. 113, referred to.

Per Anglin, J. (Idington, J., contra). The defence of common employment, although taken away by legislation in the province of Saskatchewan, where the injuries were sustained, was available as a defence in the Courts of Manitoba, where the action was brought. *The "Halley,"* L.R. 2 P.C. 193, referred to.

Judgment appealed from, 23 Man. R. 435, affirmed, Idington and Duff, JJ., dissenting.

Per Idington and Duff, JJ., dissenting. Section 264 of the Railway Act imposes upon railway companies the absolute and continuing duty not only to provide, but also to maintain in efficient use the apparatus thereby required; where it is shewn that the apparatus failed to operate, when used, the onus is upon the railway company to shew that there had been a thorough inspection thereof made to ascertain that it was in efficient working order before the train was moved. *Johnston v. Southern Pacific Ry. Co.*, 25 S.C. Repr. 158, referred to.

Appeal dismissed with costs.

F. B. Proctor, for appellant. *C. H. Locke*, for respondents.

Book Reviews.

The Principles of Equity. By EDMUND H. T. SNELL, Barrister-at-law. 17th Edition by H. GIBSON RIVINGTON, M.A. and A. CLIFFORD FOUNTAINE. London: Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar.

The announcement of a new edition of Snell's Equity from which generations of law students have learned their equity from the time when the memory of man runneth not to the contrary is sufficient without a review. How we have "crammed" it, and with what trepidation did we scan the Examiner's questions when the fatal day came!

Bouvier's Law Dictionary and Concise Encyclopedia. By JOHN BOUVIER. Third revision, being the 8th edition. By FRANCIS RAWLE, of the Philadelphia Bar. (3 Vols.). Kansas City, Mo.: Vernon Law Book Company, St. Paul, Minn. West Publishing Company. 1914.

The editor in preparing this third revision treats more fully all encyclopedic titles except those in which there has been no development of recent years, and has added many dictionary and other minor titles not found in the last revision. As a field of legal literature widens out this of course has been found a necessity and the work now covers three volumes. Owing to the similarity between the laws of the Dominion and those of the United States, and as this widening out is in the direction of the development of this continent it is well to have a dictionary of this sort in addition to any law dictionary published in the mother country. The work however, is so well and so favourably known that it is not necessary to further enlarge. It is a necessity in every lawyer's library.

Leading Cases in Canadian Constitutional Law. By A. H. F. LEFROY, K.C. Toronto: Carswell Company, Ltd. 1914.

This little book of 112 pages purports to be a complete collection of leading decisions under that part of the constitution in the Dominion of Canada which is comprised in the British North America Act, 1867. It is designed mainly for the use of students, but good for their masters in the law; and one can naturally suppose that one so well versed in constitutional law as Mr. Lefroy, has made a careful selection. It being the duty as well as privilege of a reviewer to criticize, we might suggest that a few lines at the beginning of each case indicating the subject dealt with would be a desirable addition.

The Lawyers Reports Annotated. New series, Book 52. BURDETT A. RICH and HENRY P. FARNHAM, editors. Rochester, N.Y.: The Lawyer's Co-Operative Publishing Company.

This series of reports is one of "the seven wonders of the world" in the way of law reporting. It not only reports all United States cases of any value, but it gives what is in reality a continuous stream of text books of the most modern character.

The number of cases decided is legion. Too much "legion" for that matter for a practitioner; but the evil of quantity is as much as possible alleviated by the careful selection made. The annotations cover every phase of litigation. The indices which are sent from time to time bring the contents of the series down to date, so that no time is lost the practitioner. Those of our readers who wish to know all the law on subjects dealt with (the citations are not confined to American cases only, but include English and Canadian) had better subscribe.

War Notes.

On May 23rd war was declared by Italy against Austria, but as yet no formal declaration of war as between Germany and Italy.

The reputation which our Canadian soldiery has acquired for desperate valour and dogged endurance during the present war has been gained at a sad loss of life, limb and liberty. No exact figures are available as to the casualties since they went to the front, but it is estimated that the total list up to the end of last month would be about 6,500, out of probably about 16,000 on active service in France and Belgium. Of this 6,500 it is estimated that probably about 1,200 have been killed, and as many missing, which would leave over 4,000 as wounded.

The necessity for placing Teutons where they cannot do things which would shew them to be rather of the nature of wild beasts than of human beings has become evident to the long-suffering Britisher. The *Law Times* of May 15th claims that more energetic action in this direction is necessary. The writer says:—"It is to be hoped that immediate steps will be taken to deal with the thousands of alien enemies who at present are left in practically complete liberty up and down the country. In order to be of any use at all, the measures adopted must be complete, and the only effective measures are internment and repatriation. We would also call our readers' special attention to the new French naturalisation law, the terms of which were published last week. A like law might well be adopted in this country, for the naturalised Teuton, in many cases, is as great a menace to the State as his compatriot who has not gone through the mere formality of obtaining naturalisation."

This may strengthen the hands of those who are responsible for taking care of the Germans in this country. We are glad to know that we are all beginning to realize the gravity of the situation. It is rather appalling to think of what would be necessary in this line should the United States be compelled to declare war against Germany; an event much to be deplored, but which the latter country seems desirous of forcing.

We all deeply sympathise with Mr. H. Gordon Mackenzie, Barrister, of Toronto, in the loss of his two sons, who laid down their lives for their country in the recent desperate fights near Ypres; and not with him only (though his loss up to this date has been the most severe), but with all of our brotherhood who have suffered in the same way; and there are sadly too many of them. The news also comes of the death of Lieut. A. N. Morgan, Barrister, of New Liskeard, Ont., son of Henry J. Morgan of Ottawa; also of Lieut. David Mundal of Moosemin, Sask., a young man of bright prospects and promise.

We should be glad to receive from any of our subscribers any information which may be of interest in connection with those of the profession who are on active service.

The British Cabinet has been, as announced by the Premier on the 25th ult., reconstructed on a coalition basis for a more effectual carrying on of the war. The invitation given by Mr. Asquith to the Opposition leader to join forces with the Liberal Party for the above purpose is as follows:—

“After long and careful consideration, I have definitely come to the conclusion that the conduct of the war to a successful and decisive issue cannot be effectively carried on except by a Cabinet which represents all the parties in the State. I need not enter into reasons sufficiently obvious which point to this as the best solution in the interests of the country of the problems which the war now presents; nor does the recognition of its necessity involve any disparagement on my part of the splendid service which, in their several spheres, my colleagues have rendered to the Empire. In this great and trying emergency my colleagues have placed their resignations in my hands, and I am, therefore, in a position to invite you and those who are associated with you to join forces with us in a combined Administration, in which I should also ask the leaders of the Irish and Labour Parties to participate, whose common action, without prejudice to the future prosecu-

tion of our various divergent political purposes, should be exclusively directed to the issues of the war."

The *personnel* of the Cabinet, as reconstructed, is as follows:—

Prime Minister and First Lord of the Treasury—Herbert H. Asquith, K.C.

Minister without portfolio—Lord Lansdowne.

Lord High Chancellor—Sir Stanley O. Buckmaster, K.C.

Lord President of the Council—Lord Crewe.

Lord Privy Seal—Lord Curzon of Kedleston.

Chancellor of the Exchequer—Reginald McKenna.

Home Secretary—Sir John A. Simon, K.C.

Foreign Secretary—Sir Edward Grey.

Colonial Secretary—Andrew Bonar Law.

Secretary for India—J. Austen Chamberlain.

Secretary for War—Lord Kitchener.

Minister of Munitions—David Lloyd George.

First Lord of the Admiralty—Arthur J. Balfour.

President of the Board of Trade—Walter Runciman.

President of the Local Government Board—Walter H. Long.

Chancellor of Duchy of Lancaster—Winston Spencer Churchill.

Chief Secretary for Ireland—Augustine Birrell.

Secretary for Scotland—Thomas McKinnon Wood.

President of Board of Agriculture—Lord Selborne.

First Commissioner of Works—Lewis Harcourt.

President of Board of Education—Arthur Henderson.

Attorney-General—Sir Edward Carson, K.C.

Seven of the above are members of the legal profession, namely:—Mr. Asquith, Sir Stanley O. Buckmaster, Sir John A. Simon, David Lloyd George, Augustine Birrell and Sir Edward Carson.

PROVINCE OF NEW BRUNSWICK

The members of the profession in this province who have enlisted for active service are as follows: Colonel H. H. McLean, K.C.; Lieut.-Colonel W. Henry Harrison, Major C. Herbert McLean, Major Edward C. Weyman, Lieut. Cyrus F. Inches, Herbert J. Smith, C. F. Sanford, H. F. McLeod, K.C.; Percy A. Guthrie, A. N. Vince, E. K. Connell, G. R. McCord, A. E. G. McKenzie, I. C. Spicer, H. H. Vanwart.

ALBERTA

Barristers who have enlisted for active service overseas:—

Stanley Livingstone Jones, K.C., Lieut. Princess Patricia Regiment, Calgary; Daniel Lee Redman, Lieut. 10th Battalion,

Calgary; Geoffrey Grant Lafferty, Lieut. Lincolnshire Battalion, Calgary; Reginald Stewart, Major 31st Battalion, Calgary; William Antrobus Griesbach, Lieut.-Col. 49th Battalion, Edmonton; Frederick Charles Jamieson, Major, Edmonton; Charles Arthur Wilson, Edmonton; George Thorold Davidson, Medicine Hat; Ivor Stanley Owen, Medicine Hat; James Hampton Brown Will, Athabasca; Arthur Charles Kemmis, Lieut.-Col. 13th Mounted Rifles, Pincher Creek; William Hector McLelland, Lieut. Artillery, Lethbridge; Henry Seymour Tobin, Lieut.-Col. 29th Battalion, Vancouver; Henry Squires Steele, Victoria; Robert Fulton Barnes, Macleod; David Christie Black, Army Service Corps, Calgary.

Students who have enlisted for active service overseas:—

W. Roberts Lister, Edmonton; Stanley Harold Kerr, Edmonton; Herbert Austin Beck, Edmonton; Rowan Purdon Fitzgerald, Edmonton; Humphrey Burnett Phillips, Edmonton; Alfred Koch, Edmonton; Charles Yardley Weaver, Capt. "A" Company, 49th Battalion, C.E.F., Edmonton; James Christian Lawrence Young, Edmonton; Desmond St. Clair George, Corp. 31st Battalion, Red Deer; John Francis Costigan, Capt. 50th Battalion, Calgary; John Francis Proctor, Capt. 50th Battalion, Calgary; Joshua Stanley Wright, Adjutant 50th Battalion, Calgary; Arthur Gardner Lincoln, Capt. "A" Squadron, 13th Mounted Rifles, Calgary; James Hugh Campbell, Lieut. "B" Squadron, 13th Mounted Rifles, Macleod; Ernest Frederick John Vernon Pinkham, Capt. 31st Battalion, Calgary; Ross Malford Sherk, Olds.

Of the above the only names that have as yet appeared in the casualty list are: Lieut. Jones, K.C., who was wounded but has again gone to the front, and Lieut. Redman, who was wounded at Ypres on 25th April.

Bench and Bar.

The *Canada Gazette* tells us that His Majesty has been pleased to approve of the retention of the title of Honourable by Sir Charles Peers Davidson, on his retirement of the Chief Justiceship of the Supreme Court of Quebec. He appears therefore to be entitled of right to this distinction, whereas it is only according to other retired judges, so far as we know, as a matter of courtesy.

OBITUARY

HIS HONOUR DAVID JOHN HUGHES,
Late Judge of the County of Elgin.

A notable figure passed off the scene when the late Judge Hughes died at St. Thomas, on April 21st, in his 95th year.

Mr. Hughes was born in Kingsbridge, Devonshire, England, on 7th May, 1820. In 1832 the family came to Lower Canada. Subsequently Mr. Hughes moved to St. Thomas where he was called to the Bar in 1842. In December, 1843, he went to Woodstock, practicing law there until 1847, when he went to London, forming a partnership with Mr. Wilson. In 1853 he was appointed Judge of the County Court of the County of Elgin, where he resided until his death. His first wife was Miss Richardson, daughter of the late Richard Richardson, Manager of the Bank of Upper Canada at London, Ontario. His second wife was the daughter of the late Edward Rowland of St. Thomas.

No better estimate of his character could be given than what appears in the *St. Thomas Times*, which we copy and bear witness to its accuracy:—

"The death of His Honour Judge Hughes marks the close of a long and remarkable career. His wonderful vitality, nearly a quarter of a century after having passed the mile-stone of man's allotted span, had for years rendered the venerable jurist a notable figure in the life of the community. With a record of one year more than half a century actually presiding on the bench in our courts of law, the late Judge Hughes was for many years a dominating personality in legal circles in this country. A man of fixed convictions and unalterable principles of the highest order, he dispensed justice impartially according to the dictates of his well-balanced legal mind, and to his careful interpretation of the statutes of the land. His grave, scholarly and stern cast of countenance masked a kindly spirit, and his keen, shrewd eye could twinkle with whatever humour appealed to him. While undoubtedly he owed his longevity and splendid constitution largely to the sturdy stock from which he descended, he also owed much to his rational mode of life and the fact that his constitution never suffered ill-treatment at his hands. The name of His Honour Judge David John Hughes will ever be inseparably bound up with the annals of Elgin and, to some extent, Middlesex, counties. His passing severs one of the fast disappearing links connecting Elgin County and St. Thomas with the early days of development in every walk of life."

Judge Hughes was a frequent and valued contributor to the columns of this Journal; and the writer has a very pleasant and grateful remembrance of most valued assistance from him in the preparation of the last edition of his Division Court Manual. Judge Hughes had a thorough mastery of the practice and procedure of the local courts and of the various important matters which come before County Court Judges in the discharge of their duties. He lived an honourable and useful life.

HIS HONOUR ALEXANDER FINKLE,
Late Judge of the County Court of Oxford.

We regret to record the death of the late Judge Finkle, which occurred on the 28th ultimo at his residence at Woodstock, at the age of 74 years. The deceased was born at Woodstock, where he resided the greater part of his life. He was educated at the Grammar School there, was called to the Bar in 1862, and in 1886 was appointed County Judge. He resigned that position in October of last year. He was very popular with the profession, an able Judge, and much respected citizen.

JUDICIAL APPOINTMENTS.

His Honour Alphonse Basil Klein, Junior Judge of the County Court of the County of Bruce, Province of Ontario, to be Judge of the County Court of the County of Bruce, vice His Honour Judge Barrett, deceased. (May 12.)

Alfred Mansell Greig, of the Town of Almonte, Province of Ontario, Barrister-at-law, to be the Junior Judge of the County Court of the County of Bruce.

Hon. Wallace Graham, Judge in Equity of the Supreme Court of Nova Scotia, to be Chief Justice of the Supreme Court of Nova Scotia, in the room and stead of Sir Charles James Townshend, who has resigned the said office. (April 19, 1915.)

Hon. Mr. Justice Ritchie, one of the Puisne Judges of the Supreme Court of Nova Scotia, to be Judge in Equity of the said Court, in the room and stead of Hon. Wallace Graham, formerly the Judge in Equity, promoted to the Chief Justiceship of the said Court. (May 12, 1915.)

*ARTICLES OF INTEREST IN CONTEMPORARY
JOURNALS.*

- Trial by Courtmartial—*Law Magazine and Review*, February.
 Sales without Reserve—*Ib.*
 Some Changes in the Law of Naturalization—*Ib.*
 Contraband of War—*Ib.*
 Compulsory Service—*Law Notes* (England), February.
 The Suppression of Contraband Trade—*Case and Comment*,
 January.
 Right of Belligerent Vessel in Neutral Port—*Ib.*
 Liability of Proprietor of Place of Public Amusement for Injury
 to Patron—*Ib.*, February.
 Trustees and War Risks—*Law Times*, February 27.
 Sales of Land Free from Encumbrances—*Ib.*, March 6.
 Obstructions to Rights of Way—*Ib.*, March 13.
 The Blockade of Germany—The Naval Order-in-Council—*Ib.*,
 March 20.
 Statutory and Other Public Duties—*Ib.*, March 27.
 Donations Mortis Causa and Delivery—*Solicitors Journal*, Feb. 20.
 War by Sea—*Ib.*, February 27.
 The Blockade of Germany—*Ib.*, March 20.
 Injunction against Libel as Injurious to Property Rights—*Central
 Law Journal*, January 29.
 Duties and Rights of Neutral Governments—*Ib.*, February 5.
 The Degree of Care Required of an Automobile Driver Approach-
 ing a Railroad Crossing—*Ib.*, February 19.
 Promises or Pledges of a Candidate for Office and His Eligibility—
Ib., March 5.
 Mailing a Letter as Determinative of Place of Delivery of a Con-
 tract—*Ib.*, March 26.
 Double Compensation to Executor Acting as Trustee—*Law Notes*
 (N.Y.), March.
 The Increase of Crime—*Case and Comment*, March.
 The Foundation of Prison Reform and Prison Reform—*Ib.*
 The United States of the World—*Ib.*
 Legal Proceedings Against Enemies—*Law Times*, April 3.
 The Executors' Year—*Ib.*, April 10.
 Restraint on Anticipation—*Ib.*, April 24.
 Clogging the Equity of Redemption—*Solicitors' Journal*, April 17.
 Old Agreements and Modern Circumstances—*Ib.*, April 24.
 Employers' Liability Insurance as Opposed to Public Policy—
Central Law Journal, April 2.

Status of Employers While Riding in Employers' Conveyance—*Ib.*, April 16-23.

Invasion of the Insurance Field by States by Workmen's Compensation Laws—*Ib.*, April 30.

Aircraft Attacks—*Law Magazine*, May.

Householders' Liability for Damage Caused by Falling Tiles, *Ib.*

Reprisals in War Time—*Ib.*

Judicial Statistics, England and Wales, 1913—*Ib.*

Flotsam and Jetsam.

A bill has been introduced into the Missouri legislature making it a misdemeanor to swear. Each year, according to the provisions of the bill, every man must appear before the court clerk and make affidavit as to the number of times he has used profanity during the year, and fines or taxes are to be imposed according to the returns so made. Punishment for perjury can be inflicted for false returns. If this bill is enacted into law its effect as a deterrent of profanity will have to be somewhat discounted by the no inconsiderable amount of "swearing off" that will be done before the clerks of court. It is not likely, however, that the bill will be reported out of committee. Not that there will be any lively consciousness on the part of the Missouri legislators as to the futility of attempting to legislate morality into people, but rather that the bill obviously attacks a cherished privilege of the legislators themselves. Their reformatory energies will doubtless be directed into other and less personal channels. They will be apt to

"Compound for sins they are inclined to,
By damning those they have no mind to."

The statement made by Henry Ford, the automobile manufacturer, before the Industrial Commission, that he could reclaim and make men of prison convicts by putting them to work in his plants, is being given a practical test. A Cincinnati Judge has taken advantage of Mr. Ford's offer to allow the sentencing of men to work in his shops, and has recently sent a young man convicted of non-support of his wife and child to the Detroit plant instead of to jail.—*Law Notes*.

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No. 8

POWER OF PROVINCIAL LEGISLATURES TO ENACT STATUTE AFFECTING THE RIGHTS OF NON-RESI- DENTS. A REPLY TO SOME OF MY CRITICS.

By C. B. LABATT.

- I. *Introductory.*
- II. *Discussion of Mr. Masters' criticisms.*
- III. *Further comments upon Mr. Lefroy's theory as to "civil rights in the Province."*
- IV. *Mr. Ewart's refutation refuted.*

I. *Introductory.*

An article of mine dealing with the powers of Provincial Legislatures in respect of the enactment of statutes affecting the rights of non-residents was published in the CANADA LAW JOURNAL of Sept., 1914. Most of it was devoted to a discussion of the views of three writers concerning the same subject. In one of the sections I replied to some comments which Mr. Masters had made (CANADA LAW JOURNAL, April 1, 1914), upon an earlier article (CANADA LAW JOURNAL, Feb. 2, 1914). In the other two I discussed certain theories which had been advanced by Mr. Lefroy in the *Law Quarterly Review*, and by Mr. Ewart in the *Canadian Law Times*. From all these gentlemen my article has evoked rejoinders which the pressure of other work has hitherto prevented me from noticing. The exceptional importance of the judgment of the Privy Council in *Royal Bank v. Rex*¹, with reference to which the controversy has been carried

¹ [1913] A.C. 283.

on, is an ample warrant for some additional discussion both of that case itself and of the questions of constitutional law which it has incidentally raised. In the present article, therefore, I propose to analyse the arguments and theories of these critics, whose views, it may be premised, are essentially different to mine in almost every respect.

But before I take up this part of my task I wish to acknowledge gratefully the support accorded to me by the letter signed "G. S. H.," which was inserted in the November issue of this Journal p. 583). This writer has shewn very clearly by a simple and readily comprehensible illustration the preposterous consequences to which Mr. Lefroy's theory would lead, if carried to its logical conclusions. Mr. Lefroy denies the pertinency of the illustration. This was only to be expected. The question is one which the readers of the letter and his rejoinder must determine for themselves, with such assistance as I may be able to render in the present article.

II. Discussion of Mr. Masters' criticisms.

In the CANADA LAW JOURNAL, November, 1914 (p. 556), Mr. Masters again argues in favour of the doctrine which he put forward in his earlier article, and which I criticized in the article of which this is a continuation, viz., that the Alberta Act discussed in *Royal Bank v. Rex*, might properly have been held *ultra vires* even if the proceeds of the sale of the bonds had been situated in Alberta. He says:—

"It must be borne in mind that this is not the case of an Act that may be *ultra vires* in part and *intra vires* as to the remainder. It is a single provision relating to specific property and must either be entirely within or beyond the competence of the legislature. That being so the simple proposition is this: The Act cannot be both *intra vires* and *ultra vires*. It is *intra vires* as dealing with property; *ultra vires* as to civil rights out of the province. Which is to govern? My opinion is that in such a case it would be *ultra vires*."

In this passage it seems to me Mr. Masters is relying upon a principle which has no application to the circumstances supposed. The Alberta Act was not a law "relating to" the "civil

rights" of the bondholders. It related merely to their "property," and its operation in respect of their rights was merely an incidental and necessary consequence of its operation with regard to that property. For practical purposes no doubt the results are the same, whether a statute relating to the property of non-residents does or does not purport specifically to deal with their rights also. But from the standpoint of constitutional law it makes all the difference in the world, whether such a statute affects those rights directly or merely consequentially. The Alberta Act was by its terms applicable simply to the fund derived from the sale of the bonds. It made no reference whatever to the rights of the purchasers themselves. It simply ignored those purchasers except in so far as they were of necessity alluded to for the purpose of furnishing an intelligible description of the subject matter with which the Legislature was undertaking to deal. Mr. Masters is apparently of the opinion that, if the situs of the fund subscribed by them had been in Alberta when the statute which declared it to be a part of the Provincial revenue was enacted, it would have operated directly upon their rights in the same sense as if it had contained a provision expressly referring to these rights. Upon this point I still disagree with him, and shall continue to do so until he is able to produce some specific authority for his opinion. In my former article I referred to two cases which seemed to me to be, so far as they went, precedents distinctly favourable to my view of the meaning of the clause of the B.N.A. Act which is under discussion. Mr. Masters distinguished these cases upon the ground that "in both the legislation was admittedly within the competence of the legislature." But is not this precisely the situation which exists when a Legislature undertakes to make a certain disposition of property which is then in the Province, but belongs to non-residents? A statute of the scope indicated is "admittedly within the competence of the Legislature" so far as the property is concerned, and to me it seems perfectly clear that its operation in respect of the rights outside the

Province is as purely incidental as was the operation of the statutes under review in the cases which Mr. Masters denies to be relevant. He proposes the following test of his theory:—

“Assume that in *Royal Bank v. Rex*, the bondholders had been resident in the Province and the property in Montreal. In that case the legislation would have dealt with civil rights in the Province and with property out of it, the converse of the position on which this discussion is based. Can we say that the Privy Council would have upheld the legislation in these circumstances?”

In my opinion they certainly would have upheld it. But the situation supposed is not really the converse of that involved in *Royal Bank v. Rex*. It is one in which the argument in favour of constitutionality would really be much stronger; for the Legislature having control of the persons owning the property would be dealing with their rights in precisely the same manner as a court deals in the ordinary course with suits involving the right of litigants in regard to property which lies beyond its jurisdiction. Under these circumstances a court adjusts those rights by acting *in personam*, not *in rem*. It would surely be going very far to argue that the B.N.A. Act should be construed in such a manner that, under the supposed circumstances, the powers of the Legislature would be of narrower scope than those normally exercised by judges. These considerations, I need scarcely say, are independent of the deduction which I should draw from the general principle on which I have been insisting, viz., that a statute relating to a subject-matter with which a Legislature is authorized to deal cannot be pronounced invalid on the mere ground that it affects consequentially another subject-matter over which the Legislature has no jurisdiction. If this principle is accepted, there will manifestly be no ground upon which an enactment of the tenor suggested by Mr. Masters could be annulled.

The statement in my former article that “the rights acquired by a non-resident shareholder as a result of an assignment, pledge, or testamentary disposition of shares in a Provincial company” are rights outside the Province, is still con-

sidered by Mr. Masters to be erroneous. He adheres to his theory that "no rights of a shareholder can be enforced elsewhere than in the Province of its origin." He deals seriatim with each of the transactions just mentioned; but for the purposes of the present discussion, it will be sufficient to quote what he says with regard to an assignment:—

"Take the case of a shareholder assigning his shares and wishing to assert his rights against the assignee. Would he be asserting the rights of a shareholder? Clearly not, for by the assignment he ceases to be a shareholder in respect of the shares assigned. He would thereby proceed to enforce the contract for a transfer of property made with the assignee. The position is the same in proceedings by the assignee."

The assertion here made, that "by the assignment, the shareholder ceases to be a shareholder" is, of course, correct only with regard to a contract which operates so as to pass the legal title completely to the assignee, leaving the assignor with a mere right of action for the recovery of the purchase price. If it is one of an executory nature, the assignor retains the legal title, and I do not perceive upon what ground it can be argued successfully that his remedial rights against the assignee are not the rights of a shareholder, or that they are not susceptible of enforcement "elsewhere than in the Province of the origin of the company." From the latter part of the passage quoted, as well as from the remarks which follow with regard to the consequences of a pledge or testamentary disposition of shares, I presume that, in Mr. Masters's opinion, a satisfactory and adequate answer is supplied by the conception that an assignor, when he asserts his remedial rights, is acting not as a shareholder, but merely as the owner of a certain piece of property which happens to consist of shares. But the doctrine that there is an essential distinction between the rights of a shareholder *quâ* shareholder, and the rights of a shareholder as a person dealing with shares as property is one which I must decline to accept, until some specific judicial authority for it has been produced. I am unable to see any rational basis upon which such a distinction can be predicated. It appears to me, more-

over, to be inconsistent with the language used in a very instructive New York case which I cited in the earliest article in which I discussed the powers of Provincial Legislatures (CANADA LAW JOURNAL, Feb. 2nd, 1914, p. 144).¹ Mr. Masters will, I suppose, readily concede that the highest respect is due to a decision rendered by one of the ablest courts in a country in which, owing to the large number of separate jurisdictions into which it is divided, questions of private international law are discussed much more frequently than in any part of the British Empire. In the first sentence of the extract quoted from the judgment, it is laid down that, "in legal contemplation the property of the shareholders is either where the corporation exists or at his domicile, accordingly (*sic*) as it is considered to consist in his contractual rights, or in his proprietary interest in the corporation."² That Mr. Masters read some of my article is apparent from the fact that he has commented upon it. Did the part in which I referred to this New York case escape his notice? Or had he forgotten it, when he was writing the passage upon which I am now commenting? Or does he dissent from the doctrine laid down with regard to the situs of shares and the contractual rights of shareholders? If he considers that doctrine erroneous, it is at least incumbent upon him to state the ground upon which he bases his opinion and to support it by the production of an authority not less weighty than this New York case.

III. *Further comments upon Mr. Lefroy's theory as to "civil rights in the Province."*

In his letter, which was published in the December number of the CANADA LAW JOURNAL, Mr. Lefroy has, I observe, made no reference to the point which I placed in the forefront of my criticism of his views with regard to the meaning of the expres-

¹ In *Re Bronson*, 158 N.Y. 1.

² A comparison with the language used in the latter part of the extract shews clearly that the alternatives in the second clause are placed in the wrong order, and that the expression, "proprietary interest" really corresponds with the words, "where the corporation exists."

sion "civil rights in the Province," viz., that the phraseology of the clause of the B.N.A. Act in which these words occur was "chosen with reference to the familiar rules of private international law which rest upon the distinction between the situs of substantive rights incident to property and the property to which those rights are incident." The essence of my argument in this connection was, of course, that, although the mere right to institute an action is unquestionably a "civil right," and consequently may *by possibility* have been one of the rights contemplated by the framers of the B.N.A. Act, that expression is preferably construed as embracing only those rights which are usually designated by the term "substantive." It seemed to me that this theory as to the meaning of the expression is more likely to be correct than one which could bring within its scope those purely "adjective" rights which, in the final analysis, cannot be said to have any independent juristic existence apart from the "substantive" rights to which they have relation. Which of two possible constructions of a statute is the more reasonable is doubtless a matter upon which there is always room for a difference of opinion. That Mr. Lefroy would not agree with my construction of the clause in question is shewn by the rest of his letter. But it is to be regretted that the readers of the JOURNAL should, as a result of his having entirely ignored what I said, be deprived of the privilege of learning what are the reasons for his disagreement. Is his silence upon this point due simply to a consciousness that, under the circumstances, an attempt to turn my position would be a more suitable manoeuvre than a frontal attack?

But I need not say anything more with regard to this aspect of the controversy between us, for, in my opinion, it is quite clear that, even if we assume for the purposes of the argument that "adjective" as well as "substantive" rights are within the purview of the clause in question, his position that *Royal Bank v. Rex* was wrongly decided is untenable. The general doctrine upon which he relies is thus formulated in his letter:—

"Neither Mr. Labatt, or G. S. H., answer my question—"What is a civil right except a right to invoke and set in operation the machinery of the Civil Courts, directly or indirectly, to gain some debt, or recover some advantage, or restrain some who is endeavouring to do so?" I must say I have never found any one who can answer this question."

It is submitted that the definition of a "civil right" which is offered in this passage is not, as its author considers, so indisputably accurate that only one answer can be returned to his question. On the contrary, it is obvious that, if phraseology of the description here used by Mr. Lefroy is adopted for the purpose of explaining the juristic nature of such a right, his words must be modified and supplemented in such a manner as to bring out clearly the essential point, that the existence of a "substantive" right is predicable only in cases in which a claim or defence can be *successfully* maintained upon the grounds alleged. From the above statement as well as from those in which he had previously explained his views it is apparent that, in forming his conception of a "civil right" he failed to distinguish clearly in his mind rights which are merely "adjective" from those which are "substantive." This is the cardinal error which vitiates the whole of his reasoning.

I think I am warranted in supposing that, if his definition be taken as it stands, and applied to the particular facts presented in *Royal Bank v. Rex*, it commits him to a doctrine of this purport and scope: Where a banking company organized and having its headquarters in one Province carries on business in another, and is consequently liable to be sued there, the right of action corresponding to that liability is a "civil right in the Province" in such a sense that it is competent for the Provincial Legislature to enact a statute to the effect that a specified person shall be entitled not only to institute an action against the company, but also to recover judgment and enforce it, although, at the time when the statute is enacted, the property with respect to which the action is to institute is in the custody of the company at its home office, and is claimed by a non-resident of the Province in which the statute is enacted, whose substantive

rights, apart from the operation of the statute, are admittedly superior to those of the person authorized to institute the action. The fundamental flaw which such a doctrine involves is so obvious that Mr. Lefroy's failure to perceive it is somewhat surprising. A statute which, either by its express terms, or by necessary implication therefrom, provides both that a certain person may institute an action, and also that it shall be determined in his favour, manifestly deals with two entirely distinct rights, viz., an "adjective" and a "substantive" right. Under the B.N.A. Act, a Provincial Legislature undoubtedly possess what may for the purposes of the present discussion be assumed to be an unlimited power in respect of authorizing the institution of actions in the Provincial courts. A statute by means of which this power is exercised has relation to a merely "adjective" right, the situs of which cannot possibly be in dispute. But if the Legislature undertakes to go further, and to declare that the person authorized to institute the action shall be successful therein to the extent of recovering the property which is the subject-matter of the proposed litigation, the statute is one which relates to a substantive right, and, if the property, or an interest therein, is claimed by a third person, its validity will obviously depend upon the situs of the property in question and of the right of the rival claimant. The conclusion seems to be unavoidable, that a theory of "civil rights" which ignores this aspect of the matter and its controlling importance must be unsound. Indeed, I cannot resist the temptation of suggesting that such a theory and the deductions drawn from it with respect to the decision of the Privy Council cannot be more aptly characterized than by the elegantly classical phrase, "fine flower of confused thinking," which Mr. Lefroy deems to be an appropriate description of portions of my own reasoning.

"I thank thee, Jew, for teaching me that word."

Assuredly it is only a very pronounced access of the malady of "confused thinking" that could have incapacitated my critic from realizing that the power of a Provincial Legislature to

regulate the disposition of property and substantive rights appertaining thereto is not in all cases a necessary consequence of its power to regulate the merely "adjective right" of instituting an action, or to use his own words, "invoking and setting in operation the machinery of the Civil Courts." His failure to appreciate the distinction between the two categories of civil rights, or at all events to perceive its decisive significance in any discussion of the Alberta statute, is all the more remarkable, as that distinction is constantly recognized and acted upon in ordinary judicial proceedings. Both of the parties to such proceedings are assumed in every instance to possess the "adjective" right of submitting their claims or defences to the arbitrament of the court. But manifestly it is only the successful party who can be said to possess a "substantive" right in respect of the subject-matter of the litigation.

In the general language of the two statements in which Mr. Lefroy had expounded his doctrine prior to the time when I first undertook to criticise it (see CANADA LAW JOURNAL, Sept., 1914, pp. 480, 481), I do not find any words which indicate that he then appreciated the difficulty created by the fact that the Alberta statute dealt not merely with the "adjective" right of instituting an action in the Province, but also with the "substantive" right of the English bondholders to recover the trust-fund in question. I surmise, however, that since the time when he wrote these earlier statements, it may have occurred to him that the difficulty raised by the considerations to which I have been adverting must be provided for, if his theory of "civil rights" is to be sustained; for in the paragraph of his letter which follows the passage already quoted from his letter he says:—

"My position, therefore, is simply this: The lenders in London, so far as they had a right to sue the Royal Bank in Alberta, had a civil right in Alberta, and in like manner, so far as the Attorney-General of Alberta had a right to press his action against the Royal Bank in Alberta, he had a civil right in Alberta."

The latter clause of the sentence is no wise open to objection; but it is submitted that the theory propounded in the former is

wholly erroneous. Mr. Lefroy's words can apparently bear but one meaning, viz., that in his opinion the fact that a person residing in England, but having property or interests in a Canadian Province, is *potentially* entitled to bring an action in that Province for the purpose of asserting some claim in respect of that property or those interests involves the consequence that the situs of the right of action is in that Province, even though he may have taken no active steps to assert his claim. My own view is, that the situs of his right is in England, as long as he continues to reside there, or at all events, until he has appointed an agent in the Province for the purpose of bringing the action. The conception to which apparently Mr. Lefroy's theory must be referred, if it is to be sustained, viz., that a right of action is a sort of right in gross, having a juristic existence which is so far separable from the possessor, that it has a situs in each and every jurisdiction in which an action may be brought by him for the enforcement of an obligation, seems to me so highly anomalous that I must respectfully decline to accept it on the unsupported authority of Mr. Lefroy. I confess I do not see how such a conception can be reconciled with the general principle of private international law, to which I had occasion to refer on p. 487 of the article which Mr. Lefroy is here criticising, viz., that "the locality of a debt is at the domicile of the creditor."¹

Mr. Lefroy remarks that I "seem to think that no one can have a civil right in a Province, unless he himself is domiciled in that Province." If for the term "domiciled"—which is manifestly out of place in this connection—he will allow me to substitute the words "unless he himself is actually resident in the Province, or is represented there by an agent expressly appointed for the purpose of asserting the right by legal proceedings," I have no objection to adopt this statement as being ex-

¹ The authority which I cited for this doctrine was *In re Goodhue* (1872), 19 Grant's Ch., p. 454, where Strong, V.-C., relied upon *Sill v. Warwick* (1791), 1 H. Bl. 665, 660. For a general discussion of the subject, see Wharton on Conflict of Laws, 3rd ed., p. 171 (§ 80—c).

pressive of my position. The reasons why I think myself to be justified in not receding from that position are apparent from what I have said in the preceding paragraph. My view is simply that the words "civil rights in the Province" must be construed with reference to what, so far as I am aware, is a recognized principle of private international law, viz., that the situs of rights, both "substantive" and "adjective," is determined by the place of residence, actual or constructive, of the person in whom they are vested.

The two remaining criticisms of my article which I find in Mr. Lefroy's article do not seem to call for any special observations. Their effectiveness depends entirely upon whether his general theory as to the nature of a "civil right in the Province" is or is not correct. The grounds upon which I regard that theory to be unsound have been already stated, and the readers of the Journal may be left to form their own opinions regarding the comparative weight of the arguments put forward by Mr. Lefroy and myself.

As "G. S. H." may at some future time desire to resume the controversy, I shall not undertake any detailed analysis of Mr. Lefroy's rejoinder to his letter. But one of the points which Mr. Lefroy emphasizes in his attempt to distinguish the case stated by "G. S. H." from *Royal Bank v. Rex*, has such an intimate relation to some of the remarks which I have made in the present article that it may be advisable to refer to it briefly. He says:—

"In the imaginary case which 'G. S. H.' supposes, Mr. A. B.'s agent would be able to quite truly say that he had no money when the demand was made by the Provincial Treasurer, and what is more important, that he owed no debt; but the *Royal Bank* was not in a position to say that it owed no debt."

The final clause of this sentence—(the italics are my own)—is somewhat ambiguous. If it means that the Royal Bank owed a debt to the railway company at the time when the statute in question was passed, I dispute the correctness of the statement. At that time no part of the money which the bank was directed to

pay over to the Provincial Treasurer had been earned. This is manifest from the report of *Royal Bank v. Rex*. Indeed, it may safely be said that, if the bank had "not been in a position to say that it owed no debt," to the railway company, the litigation must have had a different ending; for under the general principle of private international law to which I have already referred the situs of the debt could have been in the place of the residence of the creditor, the railway company, and the Legislature would clearly have had power to direct the debt to be paid to anyone whom it chose to specify. If, on the other hand, Mr. Lefroy means that the bank owed a debt to the bondholders, and that the powers of the Alberta Legislature to require the debt to be paid to the Provincial Treasurer was predicable on the ground that the situs of their corresponding right of action in respect of the recovery of the debt was in the Province, we are simply brought back to a question of law, with regard to which, as will be apparent from my previous remarks, his views and my own are conflicting.

IV. *Mr. Ewart's refutation refuted.*

Before I discuss the main portion of Mr. Ewart's rejoinder to my comments upon the arguments by which he undertook to demonstrate the unsoundness of the decision in *Royal Bank v. Rex*, it may be advisable to refer briefly to the singular complaint which he puts forward in the first paragraph of his article. (CANADA LAW JOURNAL, Nov., 1914, p. 560). These comments of mine are, it seems,

"not a reply. They are an unwitting (no doubt) misrepresentation of my criticism, and an unpardonable attack upon myself. Why the latter I am at a loss to say. I have not the honour of Mr. Labatt's acquaintance, and I have never made any allusion to him. His article would have remained without notice but for my unwillingness that the profession should be left without explanation of what he has thought proper to say about me."

I confess I do not understand on what theory an attempted refutation of legal doctrines deemed to be erroneous can be regarded as an "attack" upon the propounder of those doctrines.

It seems to me—and I presume the same view is generally held and acted upon—that the published opinions of a person who discusses such doctrines are no more immune from criticism than those of any other description of writers. If Mr. Ewart chooses to enter the controversial arena, he must, I suppose, take his chances of adverse comments from anyone who happens to disagree with him, and thinks it worth while to state the grounds for his dissent. Under such circumstances it is the arguments of the opponent that are “attacked,” not the opponent itself. If I used some emphatic language about Mr. Ewart’s theories, I was merely exercising a right ordinarily conceded to a critic who is dealing with statements which seem to him erroneous and reasoning which he considers to be fallacious. Nor do I see the relevancy of the fact that Mr. Ewart and I were not “acquainted” with each other before my article appeared. It certainly never occurred to me that a prior “acquaintanceship” was a necessary qualification for the task I undertook in writing that article. It is clear, however, that, so far as the future is concerned the matter is no longer of any practical importance. The article complained of may possibly have violated some code of etiquette which, without my knowledge, was applicable to the situation; but by its publication our “acquaintanceship” in a literary point of view—which is, I suppose, the only sort that Mr. Ewart has in mind—has been duly formed; and no doubt I may now, without shocking his sense of propriety, avail myself to the full of such privileges as the ceremony of introduction has conferred with regard to freedom of speech.

It is alleged, in the first place, by Mr. Ewart that what he designates as my “foundation mistake” is that I “took his article [in the *Canadian Law Times*] as a discussion of the meaning of the phrase, ‘civil rights in the Province.’” Considering that the article was a criticism of a case which was decided with reference to that phrase, the “mistake” was, to say the least, venial. Mr. Ewart contends that the case was wrongly decided. Does not such a contention necessarily involve a “discussion” of the meaning of the phrase? It would, I suspect,

puzzle most people to discover a ground upon which a writer whose position is, that the constitutional limitation defined by the expression "civil rights" was improperly declared by the Privy Council to be a controlling element in the case can be said to have abstained from such a discussion. It may be that Mr. Ewart merely intends to deny that he contemplated a general discussion of the phrase in question. If this is what he means, I need say no more than that the denial is, so far as I am concerned, quite superfluous. But it would be unprofitable to dwell any further upon this phase of our controversy. For the purposes of the present article, I am quite content to accept his latest explanation regarding the real nature of his position, and to restrict my comments to the specific points which he now draws attention.

His theory, as now defined, seems to be simply this—that, even if the construction placed by the Privy Council upon the phrase "civil rights in the Province" was correct, its decision was erroneous for two reasons, viz., that the subject-matter of the Alberta statute was *intra vires* under the clause regarding the passage of laws in relation to "local works and undertakings," and that, as it was valid in this point of view, the circumstance that it affected "civil rights outside the Province" was immaterial. (See p. 561 of his article.) Mr. Ewart complains that I took no notice of his former argument in this regard. The reason why I did not make any special reference to it ought, I think, to have been perfectly obvious to anyone who had read my article. My fundamental position was that the situs of the proceeds of the bonds which were the subject-matter of the litigation was still in Montreal when the Alberta statute was passed. The facts as reported seemed to me to warrant this position. It may or may not be correct, but it was clearly entertained by the Privy Council—a consideration which, I confess, weighed quite strongly with me, however slight may be its significance in Mr. Ewart's view. As long as I held this opinion it would clearly have been a work of supererogation to discuss the argument upon which Mr. Ewart lays so much stress. The

power of the Legislature to deal as it saw fit with the property and undertaking of the railway company in the Province was, of course, indisputable; but it seemed to me to be equally indisputable that this power could not be so exercised as to affect the disposition of money which, in my view of the circumstances, had not yet become the property of the company and was still outside the Province. Under my theory the right of the company in respect of this money was merely inchoate and conditional, and by consequence the money itself was totally disconnected from the "local work and undertaking" at the time when the statute under review was passed. This explanation will shew not only the reason why I did not refer to this part of Mr. Ewart's argument, but also the reason why I was not at all impressed with the dilemma which he so triumphantly propounded in one of the sentences which he now deems it worth while to quote from his former article:—

"If under that heading [i.e., local works and undertakings] all the rights of the bondholders, everywhere, to enforce their purchased bonds can be absolutely cancelled and destroyed, how can it be said that, acting under the same head of jurisdiction, the Legislature cannot deal with the railway and its assets in Alberta, in such a way as will incidentally deprive the bondholders of a right anywhere to cancel their purchase."

It is submitted that the consequences which Mr. Ewart assumes to be deducible from the predicament thus adverted to are far from being obvious. To me it appears simply to furnish an illustration of a doctrine which I have never questioned, viz., that the validity of a Provincial statute which is otherwise *intra vires* is in no wise affected by the circumstance that it prejudices the rights of persons outside the Province.

I am also charged with having ignored the argument which Mr. Ewart deduced from the circumstance that the specific point of law upon which *Royal Bank v. Rex* ultimately turned, viz., the right of the bondholder to demand the restoration of the trust-fund after the purpose for which the money was raised had been materially altered by the action of the Alberta Legislature had neither been properly raised by the pleadings, nor

adequately discussed at the hearing before the Privy Council. I own I cannot comprehend why he attaches so much importance to this phase of the controversy. It may be presumed that, if the counsel for the Province had deemed it desirable to ask for an adjournment of the hearing for the purpose of enabling them to consider the point, they would have done so, and that their request would have been granted as a matter of course. If they did not make such a request, the reasonable inference is that the decisive effect of the new element thus introduced into the case was immediately appreciated by them. When the point was once suggested, its relevancy was perfectly manifest, for it simply involves the application of an elementary principle of equity to the facts presented by the record. Contrary to Mr. Ewart's contention the decision relied upon by the Privy Council is, so far as its essential aspects are concerned, perfectly simple and intelligible. His insistence on this feature of the case is all the more singular, because it manifestly furnishes a strong argument against his theory that the Judicial Committee is an incompetent tribunal, so far at least as appeals from Canadian courts are concerned. That a member of that body should have been able at the eleventh hour to suggest a controlling point which had till then escaped the notice of all the learned counsel engaged on both sides, is a fact which we should scarcely have expected a critic holding his views to dwell upon.

He makes a truly astonishing comment upon what I said with regard to the imperfect character of the dilemma suggested by him, viz., that, if the Alberta Legislature had no power to pass a law disposing of the proceeds of the bonds, that fund could not be made the subject of such a law at all, the Dominion Parliament being clearly incompetent to deal with it. My suggestion was that, as the fund was deposited in the head office of the Royal Bank in Montreal, it was within the jurisdiction of the Quebec Legislature. Mr. Ewart endeavours to make out that this statement is inconsistent with another which I made elsewhere, to the effect that, in the view of the Privy Council, "the special account opened in favour of the railway company at the

Edmonton branch of the Royal Bank was retained under the control of the head office."¹ Upon what ground he regards these statements as contradictory I do not understand, unless it be that he considers that the effect of the memorandum was to transfer the situs of the fund to Edmonton. But as my position has always been, that there was no such transfer, it is clear that he has construed my second statement in a manner not justified by anything that I had said. In my point of view the situation resulting from the "retention under the control of the head office" was precisely the same as that which I intended to describe by the words "subject to the jurisdiction of the Quebec Legislature. This theory of the situs may or may not be correct; but Mr. Ewart is certainly not warranted in ascribing to my language a meaning which it manifestly does not bear, in order that he may have the satisfaction of convicting me of inconsistency. He then proceeds, still assuming that, on my own showing, the fund was situated in Edmonton, and not in Montreal, to argue that my statement to the effect that the Quebec Legislature would have been authorized to dispose of the money "in the same manner" as the Alberta statute, virtually committed me to the position that that Legislature had power to pass a law containing all the provisions of the statute by which the control of the money was transferred to the Province. Surely,

"these are but wild and whirling words."

For a term appropriate to indicate the connection which is here traced between my own remark and the deduction which he draws I really feel constrained to resort to the vocabulary of that profound expositor of the law, the First Gravedigger in

¹ He remarks that the words "in favour of the railway company" are erroneous, because the memorandum, the memorandum which the bank gave the Provincial Government, stated that the money was "to the credit of the Province of Alberta—Alberta and Great Waterways Railway special account—in the Royal Bank of Canada." I must acknowledge that my language was not strictly correct. When I wrote the sentence I was thinking rather of the ultimate destination of the money than of the channel through which it was to reach the railway company. But the error, such as it is, does not in the least affect the argument, the essence of my position being that the situs of the fund was in Montreal, not in Edmonton.

“Hamlet.” The reasoning which is supposed to confound me utterly is precisely the kind to which his clincher, “argal,” is adapted. To everybody but Mr. Ewart I suppose it will be quite obvious that, when I spoke of a similar disposition of the fund, I simply meant that any money which is deposited in a bank in Montreal might be appropriated by the Quebec Legislature for the benefit of the Province, or even, *pace* my critic, for the protection of persons in the position of the depositors. Even he will scarcely go to the length of denying that, *if* the money was so deposited—and that is my contention—this Legislature would have been acting within its powers, if it had solved the controversy between the Province of Alberta and the bondholders by the enactment of a statute, declaring that the proceeds of the bonds should be returned to the persons who had subscribed for them.

In the paragraph which follows this marvellously inept specimen of an attempted *reductio ad absurdum* we find this statement:—

“If Mr. Labatt be correct in asserting that the decision of the Privy Council really was influenced by ‘the circumstance that the special account was retained under the control of the head office,’ he has furnished us with another example of the ‘handicaps’ under which their Lordships labour in applying their attention to Canadian cases. Every Court in Canada knows that there is no part of the work of a bank agency which is not under the control of the head office. And no Court, therefore, would hold that the situs of a fund could depend upon whether cheques were to be honoured under general instructions, from the head office. If, according to the memorandum given by the bank to the government (in the present case) the fund was in Edmonton, what possible effect upon its situs could the nature of the general or special instrument from the head office to the local manager have as between the bank and the government?”

The first emotion excited by a perusal of this passage was one of profound chagrin. Is it possible, I asked myself, that, in my well-meant advocacy of the Privy Council, I have blundered so deplorably as to disclose a hitherto unsuspected proof of its incompetency as a Court of Appeal for Canadian cases? But presently I perceived that the situation was really not so bad as Mr. Ewart suggests. I received much comfort from the reflec-

tion that it is in the whole unlikely that the Privy Council should have made any serious mistake as to the incident of a banking system which is modelled upon that of Scotland, and which, in respect of such a detail of administration as Mr. Ewart refers to, is probably not very dissimilar to that of England. But the thought that finally relieved me of all uneasiness was, that the "control" mentioned in Lord Haldane's judgment was something essentially different from the control which is usually exercised by a bank with regard to money which is committed to its custody. An ordinary deposit merely creates the relationship of debtor and creditor between the bank and the depositor. But the arrangement under which the bank became the custodian of the proceeds of the bonds manifestly operated so as to render it the trustee of the bondholders for a special purpose, viz., the payment of portions of this money from time to time, as it was earned by the railway company. The Edmonton branch was merely its agent in respect of this function, and, if the railway work had progressed in the manner contemplated, each particular instalment that became payable would have remained under its control until the accounts had been passed and the money ascertained to be payable. As matters stood, it is perfectly clear that the head office would have been chargeable with a breach of trust if it had allowed any part of this fund to pass out of its direct control, until the railway company was actually entitled to receive it. That it never was so entitled is conceded. Hence the situs of the fund when the Alberta statute came into force was the same as it had been from the time when it was deposited in the Royal Bank at Montreal. This is an aspect of the matter which obviously had not occurred to Mr. Ewart when he wrote the passage quoted above. Let me invite him to consider it now. I venture to think that his failure to appreciate the all-important fact that the proceeds of the bonds constituted a trust-fund, not an ordinary deposit, goes far to justify the assertion in my former article, that his original criticism of *Royal Bank v. Rex* was "merely a superstructure of unsound doctrine, erected upon a basis of misstated facts."

Before I leave this point, it may not be amiss to suggest that the history of the negotiations leading up to the arrangement with reference to which the decision under review was rendered indicates quite strongly that it was the deliberate intention of the bondholders to ensure that none of their money should come within the jurisdiction of the Alberta Legislature until it became due and payable in respect of work actually performed by the railway company. For such caution on their part it is undeniable that the contents of certain notorious statutes which had previously been enacted in more than one of the Provinces afforded an ample justification.

Mr. Ewart next offers a notable suggestion—(or shall we say insinuation?)—in the following passage:—

“The real reason for the decision of the Privy Council is not hard to find. The statute interfered with the contractual position of the bank in a way had to justify—unless by the use intended to be made of it; and the Privy Council was probably influenced by feelings which Mr. Labatt himself entertains.”

The latter part of this statement alludes to a remark of mine to the effect that I should like to have found in the B.N.A. Act some provision which was susceptible of being construed in such a manner as to entail the invalidation of laws relating to property in the Provinces, whenever it should appear that they affected rights outside the Provinces. After quoting this remark he continues thus:—

“Whether the prohibitions of the United States constitution work beneficially or not, I do not know, but I feel no hesitation in saying that, while our constitutions remain as they are, the Courts ought not to permit themselves to be influenced by the impolicy or impropriety of our statutes.”

Mr. Ewart, therefore, intimates that, in deciding *Royal Bank v. Rex*, the Privy Council grossly violated its judicial obligations to the extent of allowing its conclusions to be influenced by the “feelings” which he assumes to have been created in the minds of its members by the confiscatory nature of the Alberta statute. It is not surprising that unworthy motives should, upon a purely hypothetical state of facts, have been ascribed to a tribunal by a gentleman who has undertaken such a preposterous

crusade against it. But the charge needs no other refutation than its own absurdity.

Of course, Mr. Ewart still adheres to his main position that the Privy Council is incapable of dealing with Canadian appeals.

"I do not question the ability of the Court. I merely say that, being unfamiliar with local conditions, and local methods, and local expressions, it cannot be as well qualified as our Supreme Court to deal with Canadian cases."

As a conclusive demonstration of incapacity, he then refers to the "black list" of erroneous decisions which he has exposed in the *Canadian Law Times*. He reminds us, moreover, that these represent only a portion of the mistakes that have been perpetrated by the Privy Council. It is scarcely necessary to say that I do not agree with the views expressed in this portion of his article any more than I do with those upon which I have already commented. To me it seems not unreasonable to take the ground that, even after full allowance has been made for the alleged drawbacks under which the Privy Council is declared to perform its duties, his own opinions are, on the whole, less likely to be correct than judgments deliberately rendered after careful hearing at which that court receives every assistance from Canadian counsel. The system of jurisprudence which prevails in all the Provinces except Quebec is fundamentally the same as that of England, and the preferable supposition seems to be that neither statutes nor modified social and economic conditions can introduce into Canadian cases any local factors which are beyond the comprehension of a tribunal composed of English judges. At the opening of such a case the members of that tribunal may be, and no doubt usually are, ignorant of all the factors of this description which may be involved. But as the arguments on both sides are developed the nature of those factors is fully explained; and if after the explanation their significance is still imperfectly appreciated, one may safely assume that they belong to some category which should not be recognized at all in a court of justice. In fact it may fairly be contended that an initial ignorance of such factors is distinctly

an advantage to litigants in this respect, that it ensures a total freedom from those subtle prepossessions which are apt to influence the minds of the most able and impartial judges who are called upon to decide cases which excite a good deal of general interest in the community. Considered in this point of view, that very ignorance of Canadian affairs which Mr. Ewart imputes to the Privy Council is calculated to inspire confidence rather than distrust in its judgments. A controversy determined by jurists of ample practical experience, who consider the law and the facts with the intellectual detachment of college professors forming an opinion in regard to the soundness of abstract doctrines, may well be said to have been determined under ideal conditions.

By way of refuting my charge that he had launched, against the Privy Council what I described as "sweeping censures and rhetorical diatribes," Mr. Ewart quotes the language of certain distinguished persons, notably Lord Haldane, with regard to the unsatisfactory state of the Supreme Court of Appeal. But language which merely imports that that court is not as good as it might be, and ought to be made better, certainly cannot be adduced as a justification for the indiscriminate attacks of a critic whose position seems virtually to be that the Privy Council is more likely than not to be wrong, when it reverses the decisions of Canadian courts, and who in the very article upon which I am commenting has intimated that, in *Royal Bank v. Rex*, it has wilfully distorted the law for the purpose of obviating what it regarded as an unjust consequence of the exercise of legislative powers. If it is not only incompetent, but even capable of such an enormity as is thus imputed, it is clearly unfit for its duties. It must be "reformed altogether" in order to be properly qualified to review cases from the Overseas Dominions.

But as a considerable period must elapse before the changes which Mr. Ewart would regard as being necessary under the circumstances can be carried out, he may perhaps deem it desirable that some temporary means should be devised by which the stream of bad law which he believes to be flowing constantly

from Downing Street should be stayed. Possibly he would himself consent, for the benefit of Canadian litigants, to act as an instructor of the Judicial Committee with regard to those local matters which he deems it to be incapable of understanding. To find a suitable appellation for such an instructor would perhaps be a little difficult. But this is a mere detail. The main point is that the court should receive the necessary information. One naturally thinks of the familiar expression, *amicus curiæ*. But the suggestion that it should be used to designate the advisory functions of a gentleman whose feelings with respect to the Privy Council are so unmistakably hostile as those which have inspired his criticisms upon it might lay me open to the charge of sarcasm—an imputation which is preferably avoided in the discussion of so serious a matter as the reinforcement of that tribunal.

C. B. LABATT.

JUDICIAL CHANGES IN ENGLAND.

A large section of the legal profession in England deplors the retirement of Lord Haldane. We have referred to this before, but whatever may have been said of him (probably quite unjustly), as to his German proclivities, it cannot affect his reputation as a lawyer and a judge. He was a distinguished scholar as well as an exceedingly able and subtle advocate with a singular clearness of mind, arriving at conclusions by applying the principles involved. One legal journal says of him, "as a lawyer, a judge and philosopher and administrator Lord Haldane well deserves to have written under his name, *Mens aequa in arduis*." Another writes as follows: "His period at the War Office saw the creation of our magnificent Territorial Force, which in the time of trial has been proved and not found wanting, while during the three years he has occupied the Woolsack his efforts in the direction of law reform have been equally successful. Both the House of Lords and Judicial Committee are immeasurably superior as final appellate courts since Lord Haldane was at the head of the legal world, while his exercise of patronage

has been beyond reproach. His legal attainments are beyond question, and it is eminently satisfactory to think that his valuable assistance will be still available for the courts of final resort."

Lord Haldane's successor, Sir Stanley Buckmaster, has long been known as an admirable equity lawyer with a scholarly knowledge of legal principles, enhanced by a dignified forensic style.

Sir John Simon, who might have claimed the position of Lord Chancellor, refused it for the less important office of Home Secretary. The *Solicitors' Journal* thus refers to this. "Probably no man before was ever offered the Woolsack at 42, and certainly no man has refused it for the lesser office of Home Secretary. There have been one or two lawyers who have refused the Woolsack for reasons of political conscience; of these Lord James of Hereford is the latest and most famous example. But the new Home Secretary has refused, while yet his days of youth at the Bar are scarcely over, the greatest prize in his profession, because he prefers a political career. To choose the Woolsack and the House of Lords is to bid good-bye to the future leadership of the Liberal party, for no peer is likely to lead that party in the years to come. The steadfast coolness of judgment and the intellectual courage which can lead a lawyer to reject the dazzling prize in the hand for the possible chance of a greater prize in the future are indeed rare qualities; one feels that conspicuous greatness of mind and grandeur of will are shewn by the man who can so act."

COSTS AS BETWEEN SOLICITOR AND CLIENT.

The English Court of Appeal have recently in *Giles v. Randall* (112 L.T. 271) been considering the proper method of taxation of costs "as between solicitor and client," and came to the conclusion that where such a taxation is ordered between party and party, the taxation is stricter than on a taxation between the solicitor and his client. Lord Justice Buckley, in his judg-

ment, styles a taxation "as between solicitor and client" as including both taxations between the solicitor and his client and a taxation of solicitor and client costs between party and party. Such a classification, however, seems unnecessarily confusing. The three methods of taxation are more properly classified as Boyd, C., points out, in *Heaslip v. Heaslip*, as follows:—

- (a) Taxations "between solicitor and client."
- (b) Taxations "as between solicitor and client."
- (c) Taxations "between party and party."

Both (b) and (c) are taxations between party and party but, under (b), the party taxing is entitled not merely to the usual costs taxable between party and party but also to certain of the other costs which are taxable between the solicitor and his client—but as the case of *Randall v. Giles* shews, such a taxation is stricter than it would be "between solicitor and client," and as a matter of common experience very little more is taxable than on an ordinary taxation between party and party; where, however, costs as between party and party are ordered to be taxed "between solicitor and client" no greater costs can be taxed than if the taxation were ordered "as between solicitor and client:" see *Heaslip v. Heaslip*, 14 P.R. 165.

Lord Justice Buckley regretted that the practice had arisen of differentiating between a taxation "between solicitor and client" and "as between solicitor and client," but considered the practice to be too firmly established to be now altered.

JUDGMENTS, AS AFFECTED BY THE STATUTE OF LIMITATIONS.

Two cases have recently been before the Courts respecting the operation of the Statute of Limitations as regards judgments. In *Poucher v. Wilkins*, 7 O.W.N. 670, the first Appellate Division determined that where a writ of execution has been kept alive by renewals, the execution may be enforced, or the writ may be continued to be renewed, even after the lapse of twenty years from the date of the judgment. The renewal

of an execution was held not to come within the term "action" in s. 49 of the Statute of Limitations (R.S.O. c. 75). From this case it follows that although the time for bringing an action on a judgment may have expired, yet if a writ of execution has been kept duly renewed it will continue enforceable notwithstanding the expiry of the period of limitation for bringing an action on the judgment.

In *Doel v. Kerr*, 8 O.W.N. 244, Middleton, J., on appeal from the Master in Chambers held, that where twenty years have elapsed from the recovery of a judgment, an application for leave to issue an alias writ is an "action" and is therefore barred by the Statute. In view of the remarks of the learned Chief Justice of Ontario in *Poucher v. Wilkins*, *supra*, as to what is meant by "action" we think Middleton, J., was hardly justified in putting his judgment on that ground. An interlocutory application in an already existing action can hardly, on any true principle of interpretation, be said to be "an action," otherwise every action would be a series of actions within an action, like "wheels within a wheel." Such an interpretation of the word "action" does not seem to be justified by s. 2 of the *Judicature Act*, although *Rule 3 (b)* may be thought to give some colour to it. By the *Rule*, garnishee and interpleader proceedings are brought within the term "action," but these proceedings are between different persons to those as to whom the action in which they arise, was between, and they do in a sense have the effect of being actions within actions, but they raise new issues between different parties. But to extend the term "action" to an interlocutory application between the original parties to an action seems to be carrying the definition beyond any legitimate limits. Where a plaintiff makes an interlocutory application for an injunction, or a commission to take evidence abroad, or to examine a defendant, or for any of the other hundred and one objects which may necessitate an interlocutory application in the progress of a cause, to say that each of these applications is an "action" seems almost to border on the absurd. We do not think any such ruling was necessary for

the decision of the case on hand. The facts were that defendants recovered judgment for costs; the twenty years from the date of the judgment expired in 1903, but an execution had been kept in force till 1905 when it was suffered to lapse. In 1908, the late Master in Chambers made an ex parte order allowing the defendants to issue an alias writ, and the application with which Middleton, J., had to deal was to set aside that order, as having been improvidently made. The fact that the application was made after the judgment was barred by the Statute of Limitations seems of itself a sufficient ground for refusing the application, as a matter of judicial discretion: see *Doyle v. Kaufman*, 3 Q.B.D. 7, 340, without resorting to such a seemingly untenable proposition as that an interlocutory application made in an already existing action is itself "an action" contrary to the view expressed by the first Appellate Division.

Doel v. Kerr settles one point as far as a judge in Chambers can settle it, that the issue of a writ of execution does not constitute a new point for the running of the Statute of Limitations. At the end of twenty years from the date of the judgment unless in the meantime there has been payment on account or a written acknowledgment of liability thereunder, it is barred by the Statute, no matter how many writs may have been issued in the meantime, but this fact will not, according to *Poucher v. Wilkins*, prevent a writ which has been continually kept in force, from being renewed, or from being enforced by the Sheriff, even after the lapse of the twenty years. This situation seems somewhat anomalous, inasmuch as in such circumstances although no action can be brought on the judgment it may nevertheless be enforceable by execution.

This is in some measure due to the effect of s. 24 of the Limitations Act (R.S.O. c. 75), which provides that a lien created by an execution continues in force so long as the process remains in the hands of the Sheriff and is kept alive by renewal or otherwise.

REVIEW OF CURRENT ENGLISH CASES.

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PRIZE COURT—BRITISH SHIP—CARGO SHIPPED BEFORE WAR—PROPERTY NOT VESTED IN ENEMY BUYER.

The Miramichi (1915) P. 71. Two points were determined by Evans, P.P.D., in this case. First, that where goods were shipped by a neutral to an enemy buyer on a British ship before war declared, and the property in the goods had not passed to the buyer but remained in the neutral seller, such goods were not subject to seizure as a prize after hostilities commenced; and secondly, that the goods of an alien enemy on board of a British ship are seizable as a prize either on the sea or in port.

MINES—GRANT OF SURFACE—RESERVATION OF RIGHT TO WORK MINES AS IF GRANT OF SURFACE HAD NOT BEEN MADE—RIGHT OF GRANTOR TO LET DOWN SURFACE.

Beard v. Moira Colliery Co. (1915) 1 Ch. 257. One Gresley through whom the defendants claimed being the owner of mineral lands, granted the surface to one Harris, through whom the plaintiff claimed, reserving the minerals and full right to work the same "in as full and ample a way and manner as if these presents had not been made and executed." The present action was to restrain the defendants who claimed under Gresley from working the minerals so as to let down the surface and also for damages occasioned by their having done so. Eve, J., dismissed the action and the Court of Appeal (Lord Cozens-Hardy, M.R., and Kennedy, and Eady, L.J.J.) affirmed his decision, being of opinion that as Gresley would, before his grant to Harris, clearly have had a right to let down the surface, his grantees had the like right as that was a necessary implication from the terms of the reservation, and this notwithstanding the ordinary rule that where the right to the land and minerals are severed, the owner of the upper strata has a right to support by that beneath, as a natural incident of property: but that right as the Court held was defeated by the express terms of the reservation in question in this case.

RESTRAINT OF TRADE—COVENANT—SEVERABILITY OF COVENANT—REASONABLE PROTECTION OF COVENANTEE.

Goldsoll v. Goldman (1915) 1 Ch. 292. This was an action to enforce a covenant in restraint of trade entered into on the sale

of a business for the sale of imitation jewellery. The covenant restricted the defendant from carrying on business of the like nature or for the sale of real jewellery in any part of Great Britain and Ireland and the Isle of Man, the United States, Russia or Spain or within 20 miles of Berlin or Venice. Neville, J., who tried the action held that the covenant was too wide in area unless severable, but he held that it was severable and might be limited to the United Kingdom and the Isle of Man, and that so limited it was not wider than necessary for the plaintiffs' reasonable protection: and as the covenant extended to both real, as well as imitation jewellery, Neville, J., granted an injunction as to both kinds of business, limited to the area of the United Kingdom and Isle of Man (1914) 2 Ch. 603. (see *ante* pp. 225-6). The Court of Appeal (Lord Cozens-Hardy, M.R., and Kennedy, and Eady, L.JJ.), agreed with Neville, J., as to the severability of the covenant as to the area, and also with the limit as to which Neville, J., granted the injunction; but the Court of Appeal thought that the injunction ought not to have restricted the defendants from carrying on business for the sale of real jewellery, and therefore varied the order appealed from by confining the injunction to imitation jewellery, to which the covenantee's business was confined.

COMPANY—MEMORANDUM OF ASSOCIATION — CONSTRUCTION —
POWER TO SELL PART OF BUSINESS TO NEW COMPANY—CON-
SIDERATION—UNION OF INTERESTS OR AMALGAMATION WITH
OTHER COMPANY.

Re Thomas, Thomas v. Sully (1915) 1 Ch. 325. A summary application on originating summons was made to the Court in this case to determine the construction of the memorandum of association of a limited company. The plaintiff company carried on business as brick makers at various places, inter alia, at Taunton where another company, Cornishes Limited, also carried on business. The articles of association of the plaintiff company provided that it should have power to sell or deal with all or any part of its property "in such manner and on such terms and for such purposes" as it should deem proper, and also to "make and carry into effect arrangements with respect to the union of interests, or amalgamation either in whole or in part with any other company" having similar objects. It was proposed that the plaintiff company and Cornishes Limited

should sell their Taunton businesses to a new company in consideration of shares or debentures of the new company. The plaintiff company and Cornishes Limited also providing the necessary working capital by applying and paying for shares or debentures in the new company. The question was whether this could lawfully be done under the plaintiffs' articles of association. Warrington, J., held that it could, and that it would be a legitimate mode of carrying out the power of uniting and amalgamating the interests of the plaintiff company with those of Cornishes Ltd.

COMPANY—DEBENTURE—TRUSTEES FOR DEBENTURE HOLDERS —
GUARANTEE OF DEBENTURES BY TRUSTEES—RE-INSURANCE OF
RISK—LIQUIDATION OF COMPANY AND GUARANTORS—DEBENTURE
HOLDERS' RIGHTS IN RE-INSURANCE MONEYS.

In re Law Guarantee T. & A. Societies, Godson's claim (1915) 1 Ch. 340. This was a liquidation proceeding and the society in liquidation had guaranteed the payment of the debentures of a brewery company the society being also the trustees for the debenture holders under a trust deed made by the brewery company. The society had re-insured part of their risk as guarantors of the debentures with another insurance company. Subsequently both the company and the society went into liquidation and the debentures remained unpaid. Godson who was the holder of all the debentures of the brewery company claimed to be entitled to the benefit of the re-insurances effected by the guarantors as against the general creditors of the guarantors. Neville, J., however, decided that although there was a fiduciary relation between the guarantors and the debenture holders under the trust deed, there was no such relation between them under the contract by which the payment of the debentures was guaranteed, and therefore that the claimant had no preferential claim on the re-insurance moneys.

COMPANY—WINDING-UP—PETITION OF UNSECURED CREDITORS—
BUSINESS CARRIED ON BY DEBENTURE HOLDER.

In re Clandown Colliery Co. (1915), 1 Ch. 369. This was an application for a winding-up order. The company was hopelessly insolvent and its business was being carried on solely for the benefit of the chairman of the board of directors who held

£10,000 debentures and was also an unsecured creditor for £10,000 out of £13,597 unsecured debts. The petitioners in ignorance of the insolvency of the company had supplied goods on credit but when they obtained judgment for their claim the chairman appointed a receiver—the petitioner therefore applied for a winding-up order in which a few trade creditors in a similar position concurred, but the application was opposed by the chairman, and a large majority of the other unsecured creditors who gave no reasons for their opposition. In these circumstances Astbury, J., considered that it was just and equitable that the company should be wound up and he made the order.

SETTLEMENT—HUSBAND'S LIFE POLICIES—PREMIUMS PAID BY
WIFE—LIEN—POWER OF APPOINTMENT—LIMITED POWER —
REVOCATION—FRAUD ON POWER.

In re Jones, Stunt v. Jones (1915) 1 Ch. 373. Two points were decided in this case. The first that where a husband by marriage settlement settled a policy on his own life on his intended wife for life, and covenanted to pay the premiums, but owing to poverty was unable to do so and the wife thereupon without communicating with the trustees or requesting them to pay the premiums, voluntarily paid them herself; in such circumstances the wife is not entitled to a lien on the policy moneys for the premiums so paid by her. And the second point was this. Under the settlement the husband and wife or the survivor of them had power of appointing the policy moneys subject to their respective life estates, in favour of the issue of the marriage. By deed the husband and wife appointed the fund in favour of their daughter, the only issue of the marriage for her life, and after her death for her children born during the lives of the appointors or within twenty-one years after the survivor's death. When the trustees refused to pay the premiums, the widow proposed to revoke the appointment, and that she and her daughter as being then solely entitled to the fund would direct the payment of the premiums; but Astbury, J., held that the trustees would not be justified in carrying out that arrangement, and that the revocation of the appointment in order to benefit the appointor would be in the nature of a fraud on the power.

COMPANY—WINDING-UP—LIQUIDATOR—REMOVAL OF LIQUIDATOR
—“CAUSE SHEWN”—COMPANIES ACT 1908 (8 EDW. VII. C.
69), ss. 149, 152—(R.S.C. c. 144, s. 32).

In re Rubber & Produce Investment Trust (1915) 1 Ch. 382. This was an application to remove a liquidator in a winding-up proceeding. The winding-up order had been made on a contributories petition containing serious charges of misfeasance against the directors; and a liquidator and a committee of inspection were appointed for the purpose of making a thorough investigation. At that time the company was apparently solvent with a balance for contributories which might possibly be increased by misfeasance proceedings. Subsequently a large claim was admitted and it was found, notwithstanding anything which might be recovered by misfeasance proceedings, that the company was hopelessly insolvent. The liquidator and committee bonâ fide and in pursuance of what they believed to be their duty continued to treat the liquidation as a contributories' liquidation and proposed to spend the creditors' assets in misfeasance proceedings contrary to the wishes of the creditors. In these circumstances Astbury, J., was of the opinion that sufficient cause was shewn for removing the liquidator under the Companies Act, 1908, s. 149 (b)—(R.S.C. c. 144, s. 32).

ELECTION—BEQUEST TO SPINSTER—BEQUEST TO MARRIED WOMAN
—RESTRAINT ON ANTICIPATION.

In re Tongue, Higginson v. Burton (1915) 1 Ch. 390. By the will of a testatrix in question in this case certain personal property to which, as the judge found, the testatrix's daughters were entitled, was bequeathed by her to her four nephews and nieces and by the same will she bequeathed her residuary estate to her four daughters, three of whom were married, and one of whom was a spinster; the shares bequeathed to the married daughters were settled and were subject to a restraint against anticipation. The question was whether the daughters or any of them were, in these circumstances, put to their election whether they would take under the will or not, and Warrington, J., decided that the married daughters by reason of the restraint on anticipation could not be required to elect, but that the unmarried daughter was put to her election. As to the shares of the married daughters the learned judge says: “the testatrix, by imposing the restraint on anticipation has shewn

an intention that while under coverture they should not be capable of disposing of that which they take under her will either by virtue of election or otherwise." As to them he considered the case was covered by *In re Wheatley*, 27 Ch.D. 606. As regards the unmarried daughter the learned judge distinguishes *Haynes v. Foster* (1901) 1 Ch. 361, on the ground that the restraint on anticipation was confined to the period of coverture, but *In re Hargrove, infra*, Astbury, J., refused to follow that case.

ELECTION—RESTRAINT OF ANTICIPATION—CONTRARY INTENTION
—SPINSTER.

In re Hargrove, Hargrove v. Pain (1915) 1 Ch. 398. In this case a similar question is involved to that in the preceding case. Here a testator gave a share of his residuary estate in trust for a spinster for life, coupled with a restraint on anticipation which was not in terms limited to coverture. He also disposed of property which belonged to the spinster—and Astbury, J., held that notwithstanding the general terms of the restraint on anticipation the spinster was put to her election and he refused to follow *Haynes v. Foster* (1901) 1 Ch. 361.

COMPANY—DEBENTURE STOCK—TRUST DEED—DISTRIBUTION OF
ASSETS—PARTLY PAID STOCK—RIGHTS OF STOCK HOLDERS
INTER SE.

In re Smelting Corporation, Seaver v. The Company (1915) 1 Ch. 472. The facts of this case were that in 1902 a company issued debenture stock secured by a trust deed. The stock was payable by instalments which were all called up by May, 1903. Some had been paid in full, and as to some, instalments were in arrear. The trust deed provided for a distribution of the net proceeds of any sale thereunder, first in payment of arrears of interest in proportion to the amount. Secondly, in payment of principal in proportion to the stock held by the stockholders. The trustees having realized the security and the question arose whether the partly paid stockholders could participate without notion bringing in the unpaid instalments as a debt due by them in accordance with the principle of *Cherry v. Boulton* (1839) 4 My. & Cr. 442. Astbury, J., however, held that that case did not apply because the transaction merely amounted to a contract to make

a loan which contract was not enforceable either in debt or by way of specific performance, but only in damages. And therefore the unpaid instalments did not constitute a debt. And he held that all debenture holders were entitled to a rateable distribution in proportion to the amounts actually advanced by them.

COMPANY—WINDING-UP—SURPLUS ASSETS—PAYMENT OF STATUTE BARRED DEBT AFTER OBJECTION BY SHAREHOLDERS—LIQUIDATOR.

In re Fleetwood and D.E.L. & P. Syndicate (1915 1 Ch. 486. In this case a liquidator having surplus assets in his hands had, notwithstanding the objection of shareholders to his so doing, paid certain statute barred debts of the company. Astbury, J., held that the payment was improper, but the recipients undertaking to refund the money, no order was made.

MALICIOUS PROSECUTION—DAMAGE NECESSARY TO SUPPORT ACTION FOR MALICIOUS PROSECUTION—PROCEEDINGS TO COMPEL ABATEMENT OF NUISANCE—DAMAGE TO REPUTATION.

In *Wiffen v. Bailey* (1915), 1 K.B. 600, the Court of Appeal, (Buckley, Phillimore, and Pickford, L.JJ.) have reversed the decision of Horridge, J. (1914) 2 K.B. 5 (noted ante vol. 50, p. 339). That learned judge held that the damage caused to the plaintiff's reputation by an unsuccessful proceeding to compel him to abate an alleged nuisance, was a sufficient ground for an action for malicious prosecution. The Court of Appeal were not able to agree to that, and thought that the proceedings in no way affected the fair fame of the plaintiff, and therefore that the action could not be maintained.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT OF CANADA.

Sask.] PEACOCK v. WILKINSON. [March 15.

Broker—"Real estate agent"—Sale of land—"Listing" on broker's books—Principal and agent—Authority to make contract.

Where the principal has merely instructed a broker to place lands on his list of properties for sale, such "listing" does not of itself constitute an authorization to the broker to enter into a contract for the sale of the lands on behalf of his principal. Judgment appealed from (7 West. W.R. 85) affirmed.

Appeal dismissed with costs.

J. F. Frame, K.C., for appellant. *W. M. Martin*, for respondents.

Que.] [March 15.

CANADIAN PACIFIC RY. CO. v. PARENT AND CHALIFOUR.

Railways—Shipping contract—Carrying person in charge of live stock—Free pass—Release from liability—Approved form—Negligence—Action by dependents—Conflict of laws—Railway Act, R.S.C. 1906, c. 37, s. 340.

The shipping bill for live stock, to be carried from Manitoba to its destination in the Province of Quebec, was in a form approved by the Board of Railway Commissioners and provided that, if the person in charge of the stock should be carried at a rate less than full passenger fare on the train by which the stock was transported, the company should be free from liability for death or injury whether caused by the negligence of the company or of its servants. C. travelled by the train in charge of the stock upon a "Live-Stock Transportation Pass," and signed conditions indorsed in English thereon by which he assumed all risks of injury and released the company from liability for damages to person or property, while travelling on the pass, whether caused by negligence or otherwise. While the

train was passing through the Province of Ontario, an accident happened and C. was killed. In an action by his dependents, instituted in the Province of Quebec, it was shewn that C. could neither read nor write, except to sign his name, and that he only understood enough English to comprehend orders in respect of his occupation as a stock-man; there was no evidence that the nature of the conditions was explained to him.

Held, Fitzpatrick, C.J., dissenting, that the railway company was liable for damages in the action by the dependents.

Per Davies, Idington, Duff, and Brodeur, JJ. (Fitzpatrick, C.J., and Anglin, J., contra), that, as C. could not have known the nature of the conditions or that they released the company from liability, and the company had not done what was reasonably sufficient to give him notice of the conditions on which he was being carried, the company was liable in damages either under the law of Ontario or that of Quebec.

Per Anglin, J.:—Although no action would lie in Ontario unless the deceased would have had a right of action, had he survived, and such an action would have been barred there by the contract signed by him, nevertheless, in Quebec, where there is no such rule of law, the action would lie, though the wrongful act had been committed in Ontario, as it was of a class actionable in Ontario: *Machado v. Fontes* ((1897), 3 Q.B. 231), applied.

Section 340 of the Railway Act, R.S.C. 1906, c. 37, provides that "no contract, condition, or notice made or given by the company impairing, restricting or limiting its liability in respect of the carriage of any traffic shall relieve the company from such liability unless such class of contract . . . shall have been first authorized or approved by order or regulation of the Board. (2) The Board may, in any case or by order or regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited." The Board made an interim order permitting the use by the company, until otherwise determined, of the shipping form used, but did not expressly authorize the form containing the conditions signed by deceased.

Held, *per* Fitzpatrick, C.J., and Davies, and Anglin, JJ. (Idington, Duff, and Brodeur, JJ., contra), that the contract signed by deceased was one of a class authorized by the Board.

Per Duff, J.:—The contract signed by deceased could not have the effect of limiting the liability of the company because

it was not in a form authorized or approved by the Board and there had been no order or regulation made by the Board expressly determining the extent to which the company's liability should be impaired, restricted or limited as provided by subsection 2 of section 340 of the Railway Act.

Judgment appealed from, affirming the judgment of the Superior Court (Q.R. 46 S.C. 319), affirmed.

Appeal dismissed with costs.

G. G. Stuart, K.C., for appellants. *R. C. Smith*, K.C., and *Savard*, for respondents.

B.C.]

[March 15.

CREVELING v. CANADIAN BRIDGE CO.

Negligence—Defective system—Injury to employee—Evidence—Verdict—Practice—Exception to judge's charge—New trial—New points on appeal.

During bridge construction a travelling crane was operated on elevated tracks under a system which did not provide of signals on every occasion when it was set in motion and it was not provided with guards for the protection of workmen employed upon the elevated stagings. A signal was given, on starting the crane, at some distance from the workmen, shortly afterwards it came to a momentary stop and moved on again towards the workmen without any further signal, and plaintiff was injured. In his action for damages, the plaintiff charged want of proper system and guards. The Court of Appeal set aside a judgment in favour of plaintiff, upon a general verdict by the jury, and ordered a new trial for the purpose of assessing damages under the British Columbia Employer's Liability Act, on the ground that it had been admitted that there was a system in existence, which, if properly carried out, would have been sufficient for the protection of the workmen.

Held, that, on a proper appreciation of the evidence, having regard to the course of the trial, the directions of the trial judge had presented the issues fully to the jury, and, there being evidence to support it, their verdict ought not to have been disturbed. *Davies*, and *Anglin*, JJ., dissented.

Per Duff, and *Brodeur*, JJ.:—Where exception to the directions of the judge has not been taken at the trial or in the first Court of Appeal, it is too late to urge such objections upon a subsequent appeal to a higher court: *White v. Victoria Lumber and Manufacturing Co.* ((1910), A.C. 606), followed.

Appeal allowed with costs, and trial judgment restored.

S. S. Taylor, K.C., for appellant. *W. N. Tilley*, for respondents.

Bench and Bar.

OBITUARY

HON. JAMES MACLENNAN.

One of the great lawyers of his day, a learned and highly respected judge as well as a distinguished citizen and a most worthy man has passed away in the person of the Hon. James Maclennan, retired Justice of the Supreme Court of Canada.

We referred at some length to his life and career up to the time of his appointment to the Bench, ante vol. 24, p. 546. We would now refer to his career as a judge, recalling also some of the principal events of his life. Mr. Maclennan was born at Lancaster in the County of Glengarry, Ontario, on March 17, 1833, being the son of Roderick Maclennan, who came to Canada in 1795. In 1849 he took his degree of B.A. at Queen's University, Kingston. He was called to the Bar with honours in Mich. term, 1857. After a short residence in Hamilton he formed a partnership with Mr. Oliver Mowat, Q.C., and Mr. Downey, in the city of Toronto. In 1871 he was elected a Bencher of the Law Society of Upper Canada, and, up to the time of his promotion to the Bench, was one of its most active and useful members. He received silk from the Dominion Government in 1873 and from the Ontario Government in 1876.

When referring to his appointment to the Bench we gave our estimate of his character and legal attainments, and predicted that he would be a strong and able judge—an expectation that was amply verified. In this regard we cannot do better than reproduce a part of the article referred to: "The appointment is one of the best that could have been made. A man of the highest personal character, Mr. Maclennan is, as our judges should be, without fear and without reproach. He is a sound and able lawyer, has had long experience at the Bar, and a judicial mind with a large fund of common sense, and is thoroughly familiar with the business of the country and the instincts of the people; at the same time he has not lost his interests in art and general literature and few men at the Bar have read more of our English classics."

On the 27th of October, 1888, Mr. Maclennan was appointed

to the Ontario Court of Appeal by Sir John A. Macdonald, vice Mr. Justice Patterson removed to the Supreme Court of Canada. This appointment of a strong Liberal by a leader of the Conservative Government was as creditable to the donor as it was to the recipient of the honour. In October, 1895, he was transferred to the Supreme Court of Canada on the retirement of Mr. Justice Nesbitt.

As a judge he was the same courteous gentleman he always had been at the Bar, and as painstaking, industrious and accurate as he had been since he first became a student. His judgments were concise, logical and lucid. He retired from the Bench in 1909; the last years of his life being spent quietly at his old home in Toronto, enjoying his well-earned repose and the society of his many friends—a cultured gentleman of the old school.

JUDICIAL APPOINTMENTS.

John Russell Armstrong, of the City of Saint John, in the Province of New Brunswick, K.C., to be Judge of the County Court for the County of the City and County of Saint John, in the said Province, vice James Gordon Forbes, who has retired from the said office. (May 27.)

War Notes.

We regret to record the death of Henry Kelleher (Queen's Own Rifles), at Langemark in April last. He was the son of Judge Kelleher of the Bengal Civil Service. He was educated at Copenhagen, Denmark; afterwards taking his B.A. and LL.B. degrees at Christ's College, Cambridge, and was an honour-man in mathematics and law. He came to Toronto in 1913, and commenced the study of the law in the office of Saunders, Torrance & Kingsmill. He was a clever student, a brilliant scholar, and a good lawyer. He contributed an article to this Journal which appears ante vol. 50 (1914), page 161. He met his death doing a very brave thing whilst reconnoitering. His fellow students and his many friends here, including ourselves, will miss him greatly.

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No. 9

THE MAKING OF RULES OF COURT.

The making of Rules of Court is generally supposed to be a somewhat formal proceeding, something like making an Act of Parliament on a small scale. In fact, Rules of Court derive their force and efficacy from Acts of Parliament by virtue of which they are made; and therefore have a statutory effect. But like many other things about which there is a halo of sanctity in the popular imagination, the making of Rules of Court would appear to be now really one of the most informal proceedings it is possible to conceive, judging by the results. Not having the entree of the judicial chambers, we are of course unable to speak with the positiveness of an eye-witness of the scene, but with a reasonably vivid imagination it is not difficult to supply the details of judicial law making.

It is well known that lawyers as a general rule, so far as their own business is concerned, are most inexact. There is the memorable instance of the Lord Chancellor who published books, pointing out to the public the necessity of depositing their wills in a place of safety, and yet, as a matter of fact, on his death his own will could nowhere be found; and its existence, and its contents had to be proved by the oral testimony of his daughter. There is also the memorable incident of another Lord Chancellor, who would never advise himself on a point of law without first transferring a guinea from one pocket to another. This attitude of mind of the legal profession is too well known to be necessary to dwell upon, but when it comes to a body of judges making Rules of Court, it is necessary to take account of it. People who do not take account of this idiosyncrasy of the legal profession picture to themselves the whole body of judges seated round a table in solemn conclave, and suppose that any rule, or amendment of an existing rule, is brought up and debated with all the solemnity

attending the making of a statute. The proposed rule, according to this idea is duly printed and a copy of it is in the hands of each judge, who has carefully weighed its meaning and effect, and thoroughly satisfied himself as to whether or not it should become a law. All present desiring to be heard, having expressed their views, the question is put and carried, or lost, as the case may be. If carried, the new rule is duly inscribed in the Book of Rules, according to its proper number, and is forthwith printed and distributed to all judges and officers of the Court, and published in the official Gazette.

Now this is a mere figment of the imagination, and by the actual results we know that it is really not the way Rules of Court are passed or published, and we must therefore have recourse to our imagination to supply us with a more probable conjecture as to the procedure, and one more in accordance with the actual and visible results. It may be that the way Rules of Court are really passed is somewhat as follows. After luncheon, a judge will probably say: "We haven't had any new rules lately; I am afraid we shall get credit for being asleep, why not pass a *Rule*? What shall it be about? is asked—"Well, I was talking to Smith the other day at Ottawa, and he said that he thought that Rule 900, I think it was, should be amended by adding the words: "as he shall think fit." "But there isn't any Rule 900." "Oh, he must have made a mistake, but that doesn't matter, that is a mere formality, I can look up the right number." "Well, what's your Rule?" "Oh I haven't written it out; has anybody got a scrap of paper?" After a general search of pockets, an old envelope is produced. "Oh, that will do (takes out a pencil and scrawls) "Rule — is amended by adding the words 'as he shall think fit.'" "I can fill in the blank." The chief justice: "Is it your pleasure that this rule shall pass." Carried. "By the way brother Brown, if you happen to come across a reporter you might tell him we have passed that rule." "All right I'll do so." "By the way where is the proposed amendment to be inserted?" On which, one of the judge's says: "I move that brother Brown do take a pin and insert it between the leaves of the authorized copy of the Rules, and that the place he shall thus

strike, be the place." Carried. Brother Brown having done as directed, remarks "the place I have struck does not seem to have anything to do with the matter." Whereupon it is unanimously agreed that that is a matter of form, and really of no importance.

On his way from the lunch room, brother Brown meets a reporter, to whom he remarks: "We have just passed a Rule, if you will come to my room, I'll give you a note of it for the press." They go to the judge's room, the reporter is handed the draft Rule, and remarks that the number of the Rule to be amended is blank. He is assured that is a mere form, and of no importance. He also remarks that the Rule has no number and is assured that also is a mere form, and of no importance. In the corner of a Toronto newspaper next day the Rule is announced, and that is the last that is heard of it. It is neither printed nor distributed to anyone, and if you don't happen to have seen the paper containing the notice, well so much the worse for you.

It may be thought that the foregoing is an exaggerated and unjustifiable conjecture as to the modern procedure in passing Rules of Court, let us take a few concrete examples in the Province of Ontario.

To begin with, the Rule which regulates the sittings of the Appellate Division is to be found on page 1090 of Holmsted's Jud. Act and Rules; but up to the present time this Rule has never been officially printed or published. It will be seen it is in the form of a recommendation, which is a curious form for a Rule, and it bears no number. If we turn to the Rules passed 1st December, 1912 (Holmsted's Jud. Act and Rules, p. 1443,) we find also an omission to number the Rule passed on that day.

If we examine Rule 66 (2), we find it has no bearing on Rule 66 (1), and apparently should have been numbered 661. (2) If the pin method of finding a place for this Rule had been adopted, the result could not have been worse.

On 26th February, 1914, The County Court Tariff of Solicitors' fees was amended by inserting at the end thereof (p. 211, line 7) the following clause: "In the Counties of Carleton, Middlesex, Wentworth and York, where a fee (other than the counsel fee at the trial) may be increased by the judge, the clerk may allow the increase subject to an appeal to the judge, and upon any such

appeal the exercise of discretion by the clerk shall be subject to review;" and ordered the Rule to come into force forthwith. Although over a year has elapsed since the passing of this Rule, it has not yet been officially printed or published, and is apparently not known even to some of the officials of the Court, for we find it appears to have escaped the notice of even the Registrar of the High Court Division, for no mention is made of it in his recent edition of the Judicature Act and Rules. We believe at the time of its passage some note of it appeared in the Toronto daily papers. We may say that no notice of it was ever received by this Journal.

When we come to look at page 211 of the Rules, we find that the page selected is not "the Tariff of Solicitors' Fees in the County Court," but the "Tariff of Disbursements in the Supreme Court," with which the amendment has nothing whatever to do, and here again the pin method for finding a place for the proposed amendment, if resorted to, could not have produced any worse result.

Is it not about time that this slipshod method of dealing with the Rules of Court should cease?

JUDICIAL IRONY.

The judicial mind is always supposed to be calm and equable, but unfortunately being encased in a human body it is sometimes apt to be tempted to betray a passing irritation and to vent itself in ironical remarks on the failings or what it may think to be the failings of suitors, learned counsel, or even of those exalted beings whom fortune has called to a higher place in the judicial hierarchy. Take for instance the following from a recent judgment of a learned County Court Judge:—

"The almost absolute certainty of counsel in this case (as it is in fact in almost every case) that his particular view of the law is correct is somewhat shaken by a perusal of the various cases passed upon and reported in the February number of the Ontario Law Reports. I find that out of the ten cases reported

there were seven dissenting judgments, and, with all respect, in several of these cases I would agree with the conclusion arrived at by the dissenting minority Judge. I am much struck with the language of His Lordship Mr. Justice Riddell in the disposing of the case of *McMullen v. Wetlaufer*, 7 O.W.N. 799, where, discussing the judgment in the case of *Clements v. Ohrly*, he says, 'If the meaning of the language as used in *Clements v. Ohrly* be more than what I have narrated, and Lord Denman intended to lay down a rule of law, he should not be followed. We cannot abjure our common sense at the bidding of any person, however eminent and able, Judge or not, English or otherwise.' Now, it cannot be thought by any stretch of imagination that any Judge of a County or District Court should be allowed such freedom of exercise of common sense. The only benefit which comes to him from such cutting loose from authority is to enable him to see, as through a glass darkly, the process of reasoning by which a Judge of the Supreme Court is able to, as it were, sidestep or overlook a prior decision of even a Divisional Court. And to this extent I am assisted by the varying conclusions which have been submitted to me as authority in this case."

Or if we wish to see how cutting a Judge can be on a litigant, of whose conduct he disapproves, we may find it in the following remarks of a learned County Court Judge in a case in which the Morrisburg and Ottawa Electric Railway was plaintiff. The Court said:—

"I have gone into Mr. L.'s case at this length, not because I ever thought for one moment that he ever had the shadow of a defence in this case, but because I thought it so extraordinary that a man in Mr. L.'s position in this matter would have such a defence and counterclaim framed for him as appears on the record herein, and, not satisfied with that, should have procured the allowance of such an amendment to the record as he has procured. If it is the air of the Capital city which has produced the strength of nerve which this defendant evidently has, and if the general public could be made to believe it, the rush

to Ottawa of patients throughout the world suffering from weakened nerves would produce an influx of population which would make this electric road pay better than, in his most optimistic moments, John McFarlane ever believed that it might."

THE MINISTRY OF MUNITIONS.

The Ministry of Munitions Act which has just been passed is the third statute designed to give the Government special powers in regard to the supply of munitions of war. The first was the Defence of the Realm Consolidation Act, 1914, passed on 27th November (ante p. 115) which, by section 1 (3), empowered the Admiralty or Army Council (a) to require the whole output of any arms or ammunition factory to be placed at their disposal; and also (b) to take possession of and use any such factory. Then the Defence of the Realm (Amendment), No. 2, Act, 1915, passed on 16th March, conferred on the same authorities further powers, namely (c) to require the work in any factory to be done in accordance with the directions of the Admiralty or Army Council; (d) to regulate or restrict the work in one factory or remove the plant therefrom, with a view to increasing the production of war material in other factories; and (e) to take possession of unoccupied premises for the purpose of housing workmen employed in connection with war material. In a speech in Manchester on the 3rd inst., Mr. Lloyd George referred to these statutes as giving him great powers of compulsion. "Persuasion," he said, "is always best when you can afford it, but sometimes you can't—there is no time for it; and one troublesome person—I don't say that you have any in Lancashire; I have never met one yet—if you have such a person, may disarrange, dislocate and clog the whole machine. You can't wait in a war until every unreasonable man becomes reasonable, until every intractable person becomes tractable; some people you can convince quickly, some take a little longer, and some do take such a lot of persuading. With the third class

the best argument you will find will be the Defence of the Realm Act." But these statutes seem to deal only with the power of taking possession of factories, and taking over their output, and arranging the work in any particular factory or at all. In fact, the Defence of the Realm Acts, in this respect are confined in their compulsory effect to employers, and this is subject, of course, to compensation, so that it is merely a case of taking property for public purposes.

Employers, as Mr. Lloyd George pointed out, are now, under the Defence of the Realm Acts, practically subject to State control for industrial purposes, and he suggested that the same principle must be applied to labour. There must, he said, be greater subordination in labour to the direction and control of the State.—*Solicitors' Journal*.

MODERN LEGAL PEERAGES.

At the accession of Queen Victoria in 1837, Lord Cottenham held the Great Seal. He was created Earl of Cottenham in 1850, and died in 1851. The other legal peers living were the venerable Earl of Eldon, Lord Manners, Lord Plunket, Lord Lyndhurst, Lord Wynford, Lord Brougham, Lord Denman, Lord Abinger, and Lord Langdale. Lord Plunket was Lord Chancellor of Ireland, Lord Denman Chief Justice of the Queen's Bench, Lord Abinger Chief Baron, and Lord Langdale Master of the Rolls. The judicial business of the House of Lords was shared by the Lord Chancellor, Lord Lyndhurst, and Lord Brougham.

In 1841, Sir John Campbell, the Attorney-General, was sent to Ireland as Lord Chancellor and created Lord Campbell. His tenure in Ireland lasted barely six weeks. He took considerable part as a Law Lord till he became, in 1850, Chief Justice of the Queen's Bench. He attained the Woolsack in 1859, and died in 1861.

In 1850, Sir Thomas Wilde, Chief Justice of the Common Pleas, became Lord Chancellor, and was created Lord Truro.

In the same year Vice-Chancellor Rolfe became Lord Cranworth. He subsequently became Lord Justice of Appeal in Chancery, and twice Lord Chancellor.

In 1852, Sir Edward Sugden, after two Chancellorships in Ireland, became Lord Chancellor with the title of Lord St. Leonards.

In 1856, there was what now appears as a ripple on the surface, though then a constitutional crisis of the first importance, in the Wensleydale Peerage case. Sir James Parke, who had long been a Baron of the Exchequer, resigned his judgeship, and it was desired to secure his services for the appellate work of the Lords. He was created by patent a baron for life as Baron Wensleydale of Wensleydale. The Lords' Committee of Privileges held, however, that a writ of summons to the holder of such a patent gave no right to sit and vote. A fresh patent, with the ordinary limitation, was eventually conferred upon Lord Wensleydale as Baron Wensleydale of Walton: (8 St. Tri. N.S. 479). Just twenty years later Parliament passed the Appellate Jurisdiction Act, 1876, which accepted the principle of life peerages.

In 1858, Sir Frederick Thesiger became Lord Chancellor, with the title of Lord Chelmsford. In the same year, Mr. Pemberton-Leigh, who had been a member of the Judicial Committee of the Privy Council since 1843, was raised to the peerage as Lord Kingsdown.

In 1861, Sir Richard Bethell attained the Woolsack, and was created Lord Westbury. In 1866, Sir John Romilly, Master of the Rolls, was raised to the peerage as Lord Romilly.

In 1867, a Scottish lawyer was added to the House of Lords in the person of Duncan MacNeill, on his retirement from the offices of Lord Justice-General and Lord-President of the Court of Session. He took the title of Lord Colonsay.

In the same year, Lord Justice Cairns was ennobled as Lord Cairns. He was subsequently twice Lord Chancellor, and was created Earl Cairns in 1878.

The Great Seal fell, in 1868, to Lord Justice Page Wood,

who was created Lord Hatherley. Sir James Plaisted Wilde, judge of the Probate and Divorce Courts, was created Lord Penzance in 1869. In 1870, Lord Chancellor O'Hagan, of Ireland, was created Lord O'Hagan.

Sir Roundell Palmer became Lord Chancellor in 1872 with the title of Lord Selborne. He was created Earl of Selborne in 1881, during his second Chancellorship.

In 1873, a peerage was conferred upon Sir John Duke Coleridge on his becoming Chief Justice of the Common Pleas, by the title of Lord Coleridge. He became Lord Chief Justice of England in 1880. His son, the present Lord Coleridge, has been, since 1907, a judge of the King's Bench Division.

Another Scottish lawyer was ennobled in 1874, when James Moncreiff, Lord Justice-Clerk, became Lord Moncrieff. His son, the second Lord Moncrieff, was a Lord of Session from 1888 to 1905.

The Appellate Jurisdiction Act, 1876, authorized the appointment of four Lords of Appeal in Ordinary—two immediately (sec. 6), and two more as vacancies occurred in the paid judges of the Judicial Committee (sec. 14). The two appointments made in 1876, were those of Mr. Justice Blackburn (Lord Blackburn) and Lord Advocate Gordon (Lord Gordon). The subsequent appointments are dealt with in tabular form below.

Returning to the class of hereditary peerages, Lord Justice Bramwell, shortly after his retirement from the Bench, was created Lord Bramwell in 1882, thus reverting to the style of Baron Bramwell, which he had long borne in the Exchequer. Sir Robert Collier, one of the paid Judges of the Judicial Committee, whose appointment via the Common Pleas had occasioned "the Collier scandal" in 1871, became, in 1885, Lord Monkswell. In 1885, Sir Hardinge Giffard became Lord Chancellor for the first time, with the title of Lord Halsbury. He was created Earl of Halsbury, during his third Chancellorship, in 1898, and, in his vigorous old age still participates in the legislative and judicial work of the Lords. In 1885, Sir William Baliol Brett, Master of the Rolls, became Lord Esher.

On his retirement from the Rolls in 1897, he was created Viscount Esher. In 1885, too, Lord Chancellor Gibson, of Ireland, was created Lord Ashbourne; and Sir Arthur Hobhouse, a member of the Judicial Committee, was created Lord Hobhouse. Sir Farrer Herschell attained the Woolsack in 1886, being ennobled as Lord Herschell. He held the Chancellorship for a second time before his premature death in 1899.

Mr. Justice Field, on retiring from the Bench in 1890, became a peer by the title of Lord Field. In 1892, Mr. Shand, who had sat in the Court of Session as Lord Shand, became a baron of the United Kingdom by his former judicial title.

In 1895, Sir Henry James, who had been twice Attorney-General and refused the Woolsack, became Lord James of Hereford and Chancellor of the Duchy of Lancaster. As a member of the Judicial Committee, he became qualified to sit as a Lord of Appeal. In 1897, Lord Justice Lopes was created Lord Ludlow, in view of his retirement from the Court of Appeal. In the same year, Lord Kinnear, of the Court of Session, became a baron by his judicial title. In 1899, Sir Henry Hawkins, who had recently retired, was created Lord Brampton.

In 1900, Sir Peter O'Brien, Bart., Lord Chief Justice of Ireland, was created Lord O'Brien. In the same year, Sir Richard Webster, Bart., Master of the Rolls, was created Lord Alverstone, and later appointed Lord Chief Justice of England. On his retirement in 1913, he was created Viscount Alverstone. In 1902, John Blair Balfour, Lord Justice-General and Lord President of the Court of Session, became Lord Kinross. In 1905, his successor as head of the Scottish judiciary, Andrew Graham Murray, was created Lord Dunedin. He has been, since 1913, one of the Lords of Appeal in Ordinary, and is the only holder of an hereditary peerage who has held the office. The case is provided for by sec. 6 of the Act of 1876.

Sir Francis Jeune, on retiring from the Presidency of the Probate, Divorce, and Admiralty Division in 1905, became Lord St. Helier. Sir Robert Reid, on becoming Lord Chancellor in

1905, took the title of Lord Loreburn. He was created Earl Loreburn in 1911.

Two more retiring Presidents of that division, have been ennobled—Sir John Gorell Barnes, in 1909, as Lord Gorell, and Sir John Bigham, in 1910, as Lord Mersey. An interesting new departure was made in 1910, when Sir John Henry de Villiers, the veteran Colonial lawyer who had been Chief Justice of Cape Colony since 1874, and became Chief Justice of the Supreme Court of South Africa, was created Lord de Villiers.

In 1911, Mr. Haldane, K.C., the Secretary of State for War, was created Viscount Haldane of Cloan. He was subsequently nominated a member of the Judicial Committee, and thus became qualified to sit as a Lord of Appeal. Since 1912 he has been Lord Chancellor. Among the New Year honours of 1914 were three legal peerages—Lord Reading (Sir Rufus Isaacs), the Lord Chief Justice of England; Lord Strathclyde (Alexander Ure), the Lord Justice-General and Lord President of the Court of Session; and Lord Parmoor (Sir Charles Alfred Cripps, K.C.), whose nomination as a member of the Judicial Committee qualifies him to sit as a Lord of Appeal. Later in the year the Master of the Rolls became a peer by the title of Lord Cozens-Hardy.

Finally, under the title Baron Wrenbury of Old Castle, Co. Sussex, the Lords have secured the judicial strength of one who, as Mr. Justice and Lord Justice Buckley, has been such an efficient judge in the Chancery Division and Court of Appeal. It is noticeable that on the creation of hereditary peerages, about one-third of the newly created peers have taken their surname as their title, about two-thirds taking some territorial title. In the case of life peerages created under the Act of 1876, the convention is entirely different. Only one of the nineteen life peers so created has not adopted his surname as his title. The exception is Lord Sumner of Ibstone, whose surname, Hamilton, was already the style of a dukedom, a baronage, and several courtesy titles.—*Law Times*.

REVIEW OF CURRENT ENGLISH CASES.

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COMPANY — SHAREHOLDERS — GENERAL MEETING — NOTICE OF MEETING—INSUFFICIENCY OF NOTICE — ACTION BY SHAREHOLDERS—PARTIES.

Baillie v. Oriental Telephone Co. (1915) 1 Ch. 503. This was an action by a shareholder on behalf of himself and all other shareholders of a limited company against the company and the directors to restrain the directors from acting upon certain resolutions passed at a general meeting of shareholders, on the ground that the notice of such meeting omitted to give reasonable and sufficient information as to the nature and effect of the business to be transacted at the meeting. The facts were that the directors of the defendant company were also directors of subsidiary company in which the defendant company held nearly the whole of the shares. In 1907, the directors in exercise of the powers of the defendant company in the subsidiary company obtained the passing of a resolution whereby the articles of the subsidiary company were altered so as to increase the fixed remuneration of the directors and also to give them a percentage of the profits. In 1913 the auditors of the defendant company drew attention to the fact that the receipt by the directors of remuneration in the capacity of directors of the subsidiary company ought to be sanctioned by the shareholders of the defendant company. An extraordinary general meeting of the defendant company was called with the object of passing special resolutions ratifying what had been done by the directors in 1907, and authorizing them to retain all remuneration received and to be received by them as directors of the subsidiary company, and altering the articles of the defendant company so as to authorize the directors receiving remuneration as directors of the subsidiary company, and to exercise the voting powers as they saw fit. The notice convening the meeting set out the proposed resolutions, and was accompanied by a circular, but neither the notice nor the circular gave particulars as to the amount (which was very large) of the remuneration which had been received, or would be receivable under the proposed resolutions. The resolutions were passed by the requisite majority and were subsequently confirmed. Astbury, J., who tried the action dismissed it on the technical ground that the company ought to have been

joined as plaintiffs. The Court of Appeal (Lord Cozens-Hardy, M.R., and Kennedy, and Eady, L.JJ.), however, held that the action was properly constituted; and on the merits determined that the notice of the meeting was insufficient and the resolutions were invalid and not binding on the company.

COMPANY—WINDING-UP PETITION—JUDGMENT CREDITOR—"PROCEED TO ENFORCE ANY JUDGMENT"—COURTS (EMERGENCY POWERS) ACT, 1914 (4-5 GEO. V. c. 78, s. 1)—(THE MORTGAGORS AND PURCHASERS RELIEF ACT, 5 GEO. V. c. 22, s. 1, ONT.).

In re A Company (1915) 1 Ch. 520, the Court of Appeal (Lord Cozens-Hardy, M.R., Phillimore, L.J., and Joyce, J.), held that a petition by a judgment creditor of a company for a winding up order, is not a proceeding "to execution on, or otherwise to the enforcement of a judgment" within the meaning of *The Courts (Emergency Powers) Act* (4-5 Geo. V. c. 78, s. 1), see 5 Geo. V. c. 22, s. 1, Ont., and an injunction granted by Astbury, J., restraining such proceedings was dissolved.

RESTRAINT OF TRADE—MASTER AND SERVANT — AGREEMENT BY SERVANT NOT TO SOLICIT CUSTOMERS, OR ADVERTISE THAT SERVANT WAS "LATE WITH THE MASTER"—REASONABLE RESTRICTION—BREACH BY FIRM—RESPONSIBILITY OF PARTNER—DETERMINATION OF CONTRACT BY PAYMENT OF WAGES IN LIEU OF NOTICE—WRONGFUL DISMISSAL.

Konski v. Peet (1915) 1 Ch. 530. The plaintiff in this action claimed an injunction against the defendant who had formerly been in his employ from soliciting his customers, or advertising herself as "late with Konski" contrary to an agreement in that behalf. After she left the plaintiff's employment she had become a saleswoman in the employment of one Phillip who had also been in the employment of the plaintiff, but who had not entered into any agreement with the plaintiff not to advertise himself as "late with Konski," and he published advertisements of his firm "Phillip (Russian) from Konski." It was alleged that the defendant was a partner of Phillip and that this advertisement was a breach of her agreement. The only customer the defendant was proved to have solicited was a lady who, as the judge found, had ceased to be a customer of Konski before the defendant's employment began; and he also found

that it had not been established as a fact that the defendant was a partner of Phillip. In these circumstances Neville, J., held that the advertisement could not be taken to mean that the defendant was "late with Konski," and was therefore no breach of the agreement: also that there had been no soliciting of the plaintiff's customers proved. The defendant set up that the dismissal of the defendant from the plaintiff's employment was wrongful, notwithstanding wages had been paid her in lieu of notice, and therefore that the agreement was abandoned, but the learned judge negatived that contention. But he found that the agreement was unlimited in time and extended to all who had been or might at any time thereafter be customers of the plaintiff, and was therefore too wide, and an unreasonable restraint, and not severable, and therefore void.

LEASE—COVENANT NOT TO ASSIGN WITHOUT CONSENT OF LESSOR—
REFUSAL OF CONSENT—REASONABLE CAUSE—COVENANT RUNNING WITH LAND.

Goldstein v. Sanders (1915) 1 Ch. 549. This was an action by a lessor to recover possession of the demised premises for breach of covenant not to assign without the consent of the lessor. It appeared that the lessee had suffered part of the demised premises to be enclosed and used with adjoining premises and it was held by Eve, J., that this was a reasonable cause for refusing to consent to an assignment of the lease, notwithstanding that the proposed assignee was a respectable and responsible person. He also held that the covenant ran with the land and bound assigns though assignees were not mentioned.

COMPANY—PROSPECTUS — MISREPRESENTATIONS — DIRECTORS—
UNCORROBORATED STATEMENTS OF PROMOTERS.

Adams v. Thrift (1915) 1 Ch. 557. This was an action by a shareholder against the directors of a company to recover damages for misrepresentations in a prospectus, on the faith of which the plaintiff became a shareholder. The defendants it appeared had relied on the uncorroborated statements of the promoter, and had not made independent inquiry, and had suffered themselves to be put off from so doing by manifestly insufficient excuses; and it was held by Eve, J., that the existence of a reasonable ground for belief in the truth of the statements of fact made in the prospectus had not been established, and that the defendants were liable as claimed.

**WILL—GIFT OF SPECIFIC PROPERTY “FREE OF LEGACY DUTY”—
FRENCH MUTATION DUTY—DUTY WHETHER PAYABLE BY EXE-
CUTORS OR LEGATEES.**

In re Scott, Scott v. Scott (1915) 1 Ch. 592. In this case the Court of Appeal (Lord Cozens-Hardy, M.R., and Phillimore, L.J., and Joyce, J.), have affirmed the judgment of Warrington, J. (1914), 1 Ch. 847 (noted ante vol. 50, p. 435), to the effect that upon a gift of property in France “free from legacy duty” the legatee and not the testator’s estate must discharge the French mutation tax to which the property is liable.

**LIEN—MOTOR CAR—AGREEMENT TO KEEP MOTOR IN REPAIR AND
SUPPLY CHAUFFEUR—RECEIVER.**

Hatton v. Car Maintenance Co. (1915) 1 Ch. 621. This was an action to recover a motor car, and for the appointment of an interim receiver. The plaintiff was the owner of the car and had made an agreement with the defendants whereby they were to supply a chauffeur and keep the car in repair and provide all necessary materials therefor, the plaintiff to be at liberty to use the car whenever she wished, and to pay an agreed price for the services of the defendants and materials supplied by them. When in London the car was kept at the defendants’ garage. An amount having become due to the defendants under the agreement, the defendants took possession of the car and claimed a lien on it for the amount due. On the motion for a receiver Sargant, J., held that as what the defendants did to the car did not improve it but only maintain it in its former condition they had no lien on it, and that even if the company had a lien it would be lost by the arrangement which allowed the plaintiff to take it away as she pleased; and on the trial of the action he remained of the same opinion, and gave judgment for the plaintiff with a direction to set off damages and costs of the plaintiff against the amount due under the agreement.

**CRIMINAL LAW—HIGH TREASON—AIDING KING’S ENEMIES—AS-
SISTING GERMAN SUBJECTS TO RETURN TO GERMANY AFTER
WAR DECLARED—DIRECTION TO JURY.**

The King v. Ahlers (1915) 1 K.B. 616, in view of some recent prosecutions which have taken place in Ontario, will be found of interest. The defendant, up to the time war was declared, had been German Consul at Sunderland. The evidence

shewed that on the 5th August, 1914, after war was declared, the defendant had assisted German subjects of an age rendering them liable to military service, with money and information to enable them to return to Germany. The defendant denied that he knew war had been declared on 5th August, 1914, when he did the acts charged, and said that he thought that after a declaration of war the subjects of the belligerents were allowed a margin of time within which to return to their respective countries. The defendant was convicted, the presiding judge having charged the jury that it was no defence that the defendant believed that he was entitled to do what he had done. The Court of Criminal Appeal (Lord Reading, C.J., and Darling, Bankes, Lush, and Atkin, JJ.), however, were of the opinion that the jury should have been told that they must consider whether the acts had been done by defendant with the intention to assist the King's enemies, or whether he acted without any evil intention and in the belief that it was his duty to assist German subjects to return to Germany, in which case he was entitled to acquittal, and in the absence of such direction the conviction must be quashed.

NEGLIGENCE—DEATH OF WIFE—HUSBAND'S PECUNIARY LOSS OCCASIONED BY LOSS OF WIFE'S SERVICES—FATAL ACCIDENTS ACT (9-10 VICT. c. 9.)—FATAL ACCIDENTS ACT, 1864 (27-28 VICT. c. 95)—(R.S.O. c. 151, s. 4).

Berry v. Humm (1915) 1 K.B. 627, was an action brought by a husband under the Fatal Accidents Act, (see R.S.O. c. 151, s. 4) to recover damages for the death of his wife caused by the negligence of the defendants. The plaintiff was a labouring man and after his wife's death, he had to employ a housekeeper and to incur extra expenses of management by the housekeeper instead of by his deceased wife. It was contended by the defendants that the plaintiff was not entitled to recover the expense so occasioned, but his damages were limited to the money value of things lost by reason of the death of the wife, but Scrutton, J., who tried the action, held that the plaintiff was also entitled to recover for the expense occasioned to him by having to provide for the gratuitous services which had been rendered by the deceased. He distinguishes *Osborne v. Gillett*, L.R. 8 Ex. 88 on the ground that the Court treated the case as one of master and servant simply, and omitted to consider the fact that it was also the case of parent and child, and that while the relation of

master and servant is not covered by the Fatal Accidents Act, that of parent and child is.

NEGLIGENCE—DANGEROUS PREMISES—HOUSE LET IN SINGLE ROOMS
—FLIGHT OF STEPS IN POSSESSION OF LANDLORD—DEFECTIVE
RAILING AT SIDE OF STEPS—LIABILITY OF LANDLORD TO INFANT
SON OF TENANT—KNOWLEDGE BY TENANT OF DEFECT IN RAIL-
ING.

Dobson v. Horsley (1915), 1 K.B. 634. The plaintiffs in this case were an infant and his father, the latter being tenant of the defendant of a room in a house owned by the defendant. The house was reached from the street by a flight of steps, which were in the defendant's possession. On both side of the steps was an area eight feet deep. The railing at the side of these steps was defective at the time of the letting, owing to a rail being missing. The infant plaintiff who was 3½ years of age, whilst playing on the steps fell through the aperture caused by the missing rail and was injured. The jury found that the railings were in a defective condition at the time of the letting so as to be dangerous to children. Ridley, J., who tried the action, dismissed it, on the authority of *Cavalier v. Pope*, 1906, A.C. 428 (see ante vol. 43, p. 90). The Court of Appeal (Buckley, Phillimore, and Pickford, L.J.J.), affirmed the decision, holding that the absence of the railing was not in the nature of a trap or concealed danger as the defect was obvious. They therefore held that *Müller v. Hancock* (1893) 2 Q.B. 177, (see ante vol. 29, p. 553) did not apply; they also held that the case was not governed by *Cavalier v. Pope*, because there the defect complained of was in the demised premises.

MASTER AND SERVANT — NEGLIGENCE OF SERVANT — OMNIBUS
DRIVEN BY CONDUCTOR IN PRESENCE OF DRIVER.

Ricketts v. Tilling (1915) 1 K.B. 644. This was an action brought by the plaintiff to recover damages from the defendants, occasioned by the negligent driving of their motor omnibus. At the end of a journey the conductor, in the presence of the driver who was seated beside him, for the purpose of turning the omnibus in the right direction for the next journey drove it through some by-streets so negligently that it mounted the pavement and struck and injured the plaintiff. Atkin, J., who tried the action, on the authority of *Beard v. London General Omnibus*

Co. (1900) 2 Q.B. 530 (see *ante* vol. 37, p. 58), held that as there was no evidence that the conductor had any authority to drive the omnibus, the plaintiff could not recover, and he dismissed the action. The Court of Appeal (Buckley, Phillimore, and Pickford, L.JJ.) ordered a new trial, distinguishing the case from the *Beard* case because in the present case the driver was present, and in the *Beard* case he was absent, and so far as appeared, without any negligence on his part; and the question in this case was whether the driver had properly discharged his duty in permitting the conductor to drive, or if he did permit him, then in omitting to see that he drove properly—which questions the Court held must be submitted to a jury.

CONTRACT—BREACH OF CONTRACT—DAMAGES—BREACH OF CONTRACT OCCASIONING PENAL OFFENCE—WHETHER FINE AND COSTS RECOVERABLE AS DAMAGES FOR BREACH OF CONTRACT.

Leslie v. Reliable Advertising Co. (1915) 1 K.B. 652, seems a rather hard case. The plaintiffs were money-lenders and as such issued circulars to the public and employed the defendants to address and send them out. By the terms of the contract with the defendants no circular was to be sent to a minor. The sending of such circulars to minors being a penal offence under the Betting and Loans (Infants) Act, 1892. In breach of their contract the defendants addressed and sent a circular to a minor and the plaintiffs were convicted and ordered to pay a fine and costs. This fine and costs and the costs they were put to in defending themselves the plaintiffs claimed to recover in this action, but Rowlatt, J., held, that the plaintiffs had no right to recover against the defendants any of the damages they had been put to by breach of the criminal law, and that there is no right of indemnity in such cases; because a person convicted of a criminal offence is not entitled to the assistance of a court of justice to ease himself of the punishment by the recovery over either of the amount of the fine or costs from some other person. He therefore held that the plaintiffs were only entitled to nominal damages.

MONEY LENDER—EXCESSIVE INTEREST—HARSH AND UNCONSCIONABLE TRANSACTION—QUESTIONS OF LAW OR FACT—MONEY LENDERS ACT 1900 (63-64 VICT. c. 51), s. 1—(R.S.O. c. 175, s. 4).

Abrahams v. Dimmock (1915) 1 K.B. 662. The only point in this case which needs to be noted here is the fact that the Court

of Appeal (Buckley, Phillimore, and Pickford, L.JJ.) have affirmed the judgment of the Divisional Court (1914) 2 K.B. 372 (noted ante vol. 50, p. 347) to the effect that under the Money Lenders Act, 1900 (63-64 Vict. c. 51) (see R.S.O. c. 175, s. 4), the questions whether interest charged by a money lender is excessive, and whether a transaction by a money lender is harsh and unconscionable are questions for the judge and not for the jury.

CONTRACT—AGREEMENT TO BUILD STEAMSHIP—DELIVERY WITHIN SPECIFIED TIME—EXCEPTIONS—FORCE MAJEURE—INDIRECT EFFECT OF STRIKE — BREAKDOWN OF MACHINERY — BAD WEATHER.

Matsoukis v. Priestman (1915), 1 K.B. 681. This was an action for a penalty for breach of a contract for the building of a steamship to be delivered at a specified time. The contract contained this exception: "If the said steamer is not delivered entirely ready to the purchaser at the aforementioned time the builders hereby agree to pay for liquidated damages (a specified penalty). . . . being excepted only the cause of force majeure and for strikes of workmen of the building yard where the vessel is being built, or at the works where steel is being manufactured for the steamer, or any works of any sub-contractor." As a result of the coal strike in 1912 the works from which the defendants obtained their materials for other ships they were building got behind; the ship in turn to be built before the plaintiff's occupied the berth that was intended to be occupied by the plaintiff's much longer than otherwise she would have done and consequently the plaintiff's steamer was late in being laid down. According to the finding of the jury there was a delay on this account of seventy days. There was a further delay of five days owing to a breakdown of machinery, and of two days owing to a shipwright's strike, and delay was also caused by bad weather and absence of defendant's men attending football matches, and in attending the funeral of the shipyard manager. It was claimed by the defendants that all of these causes of delay amounted to force majeure within the meaning of the exception; but Bailhache, J., who tried the action, held that while delays due to, or consequent upon strikes, and breakdown of machinery, were within the exceptions, delays caused by football matches, bad weather, and a funeral were not, and so far as delays were occasioned by the latter

causes the defendants were liable and judgment was given against them on that basis.

PRACTICE—NEW TRIAL—FRESH EVIDENCE—VERDICT OBTAINED BY FRAUD.

Robinson v. Smith (1915), 1 K.B. 711. This was an action for breach of promise of marriage, which had been tried and judgment given in favour of the plaintiff. The defendant applied for a new trial on the ground that since the trial he had discovered evidence of two persons previously unknown to him, to the effect that some years before the trial the plaintiff had admitted to them that she was married to a man now living. The plaintiff filed an affidavit in answer to the motion, but did not deny making the statements, but stated that she never was married to the man or to anyone else. But it was shewn that wedding cards had been sent out and that the plaintiff had written letters speaking of the man in question as her husband. The majority of the Court of Appeal (Buckley, and Bankes, L.JJ.) held that in these circumstances the defendant was entitled to a new trial, but limited to the question of the alleged marriage of the plaintiff at the time of the defendant's promise to marry her. Pickford, L.J., dissented, thinking the evidence of the alleged marriage insufficient to warrant the granting of a new trial.

CONTRACT—BUILDING CONTRACT—INTERFERENCE BY WRONGDOER WITH ACCESS TO PREMISES—DELAY AND DAMAGE CAUSED TO BUILDER—LIABILITY OF BUILDING OWNER.

Porter v. Tottenham Urban District Council (1915), 1 K.B. 776. In this case the Court of Appeal (Buckley, Phillimore, and Pickford, L.JJ.), have affirmed the decision of Ridley, J. (1914) 1 K.B. 663 (noted ante vol. 50, p. 265). The facts were that the plaintiff had contracted with the defendant to build a school-house on the lands of the defendants. The access to the land was through some adjoining lands of the defendants, over which a temporary roadway had to be made by the plaintiff to the street. The defendants put the plaintiff in possession of the site and enabled him to make the temporary roadway over the adjoining property, but the owner of the soil of the street alleged it was not a public highway and prohibited the plaintiff and threatened to sue him for an injunction. In consequence

the plaintiff ceased work for two months until after the defendants had sued the owner of the soil of the street and obtained a declaration that it was a public highway. The plaintiff claimed damages for the delay so occasioned but Ridley, J., dismissed his action and the Court of Appeal have held that he was right and that there was no warranty to be implied from the contract to the effect that the plaintiff should be at liberty to work on the land without interruption, and consequently defendants were under no liability to indemnify the plaintiffs against the loss caused by the wrongdoer interfering with the plaintiffs' access to the site.

BREACH OF PROMISE OF MARRIAGE—ACTION AGAINST EXECUTOR OF PROMISOR—SPECIAL DAMAGE—BUSINESS GIVEN UP IN CONSIDERATION OF PROMISE TO MARRY—ABATEMENT OF CAUSE OF ACTION—ACTIO PERSONALIS MORITUR CUM PERSONA.

Quirk v. Thomas (1915) 1 K.B. 798. This was an action for breach of promise of marriage brought against the executor of the promisor. The plaintiff alleged special damage occasioned by her having given up her business in consideration of the promise. The defendant contended that the maxim *actio personalis moritur cum persona* applied, and that the action would not lie; but the fact that special damage was alleged was immaterial because whether the damage was general or special there was only one cause of action, and that abated by the death of the promisor. The jury found special damage which they assessed at £350. Lush, J., who tried the action held that it was not maintainable, and dismissed it, on the ground that the cause of action was personal and did not survive, and he also held that the loss sustained by the plaintiff was not special damage flowing from the breach of the promise of marriage. The loss, in his judgment, was incurred on the faith of the two promises, that is, the mutual promise of the plaintiff and deceased, being fulfilled. The loss of business would still have been suffered even if the promise to marry had been performed.

ATTACHMENT OF DEBT—FEES PAYABLE TO PANEL DOCTOR—PUBLIC POLICY.

O'Driscoll v. Manchester Insce. Committee (1915) 1 K.B. 811. Under the National Insurance Acts 1911, 1913, certain doctors in a district placed on a panel for the discharge of certain duties

under the Acts, and the Insurance Committee appointed under the Acts, entered into agreements with the panel doctors of their district by which the whole amount, received for medical services from the National Insurance Commissioners, were to be pooled and distributed among the panel doctors in accordance with a certain scale. One of the panel doctors who was a defendant in the present action was entitled under this arrangement to receive a sum not yet ascertained, this sum the plaintiff as judgment creditor attached, and the question was raised whether the debt was attachable and an issue was ordered to be tried between the plaintiff and the garnishees. Rowlatt, J., who tried the issue, held that there was a debt due or accruing from the insurance committee to the judgment debtor which was attachable notwithstanding the exact amount of it had not yet been ascertained; and that there was no principle of public policy preventing the attachment of such a debt.

LANDLORD AND TENANT—NOTICE TO QUIT—VALIDITY OF NOTICE—
CLAIM TO CANCEL NOTICE TO QUIT IN CERTAIN EVENT.

May v. Borup (1915) 1 K.B. 830. In this case the sufficiency of a notice to quit was in question. The defendants were tenants of the plaintiff under an agreement for a yearly tenancy which provided that the tenancy might be terminated by a six months' notice to be given on March 1 or September 1 in any year. On December 23, 1913, the defendant wrote to the plaintiff giving notice to quit the premises "at the earliest possible moment" and stating that if, as they hoped, a satisfactory reorganization of their business was effected, the notice would be "cancelled." The action was brought to recover rent for the month of September, 1914; the defence was that the tenancy had been terminated on 31st August, 1914—the notice above referred to being relied on. The County Court Judge who tried the action held that the notice was conditional and therefore bad and he gave judgment for the plaintiff, which, however, was reversed by the Divisional Court (Lawrence, and Sankey, JJ.), on the ground that notwithstanding the defendants claimed the right to cancel the notice in a certain event which they did not in fact possess, that did not render the notice bad as being conditional, and therefore the notice was a valid termination of the tenancy at the expiration of six months from 1st March, 1914.

**ALIEN ENEMY—RIGHT TO SUE—LIABILITY TO BE SUED—RIGHT TO
APPEAR AND DEFEND—RIGHT OF ALIEN ENEMY TO APPEAL.**

Porter v. Freudenberg (1915) 1 K.B. 857. In this and two other cases which are reported together, some points of interest regarding the rights of alien enemies in Courts of Justice are determined by the Court of Appeal (Lord Reading, C.J., Lord Cozens-Hardy, M.R., and Buckley, Kennedy, Eady, Phillimore, and Pickford, L.JJ.). In the first place the test whether a person is an alien enemy is held to be not his nationality, but the place in which he resides and carries on business. A person voluntarily residing in, or carrying on business in, an enemy's country is defined to be an alien enemy. In the second place it is held that an alien enemy may be sued in the King's Courts and if so sued is entitled to appear and defend himself and has also a right to appeal against any judgment given against him, and where an action is brought against an alien enemy resident in the enemy's country, but who carries on a branch business in the King's dominions by an agent, leave may be given to issue a concurrent writ and make substituted service of notice of the writ on the defendant by serving the agent.

**ALIEN ENEMY—LIMITED COMPANY—SHARE CAPITAL HELD BY
ALIEN ENEMIES—RIGHT TO SUE.**

Continental Tyre & Rubber Co. v. Daimler Co. (1915) 1 K.B. 893. In this case it was held by the Court of Appeal (Lord Reading, C.J., Lord Cozens-Hardy, M.R., and Kennedy, Phillimore, and Pickford, L.JJ., Buckley, L.J., dissenting), that a limited English company, the share capital of which is owned by alien enemies is entitled to sue in the King's Courts, the Court holding that the company as a legal entity, brought into existence by Statute, was distinct from the shareholders, and that it did not change its character owing to the outbreak of war whereby the shareholders became alien enemies. The company, as the Court held, could only become enemy by being incorporated in the enemy's country, but no such incorporation had taken place. An interesting discussion of the principles involved in this case is to be found in vol. 139, L.T. Jour., p. 64.

**HUSBAND AND WIFE — MARRIAGE SETTLEMENT — CHATTELS
ASSIGNED TO TRUSTEES—WIFE ENTITLED TO USE OF CHATTELS
—DETENTION BY HUSBAND—ACTION BY WIFE — TRUSTEES
NOT JOINED—PARTIES.**

Healey v. Healey (1915) 1 K.B. 938. The plaintiff in this

case sued the defendant, her husband, for the recovery of certain chattels, which by marriage settlement had been assigned by the defendant to trustees "upon trust to allow the same to be used by" the plaintiff. The defendant took the objection that the trustees were necessary parties, but Shearman, J., overruled the objection. To say that a cestui que trust may sue in respect of the trust estate without joining the trustee appears to be a new departure.

PRACTICE—SET-OFF OF COSTS IN SEPARATE ACTIONS—SOLICITOR'S LIEN—(ONT. RULE 666).

Reid v. Cupper (1915) 2 K.B. 147. In this case the Court of Appeal (Buckley, Phillimore, and Pickford, L.JJ.), hold, affirming Scrutton, J., that notwithstanding the decision of *David v. Rees* (1904), 2 K.B. 325, which held that under Eng. Rule 989, a set-off of costs in separate actions could not be ordered to the prejudice of the solicitor's lien, yet that the Court had, under its equitable jurisdiction prior to 1853, a discretion to make such an order. It may be remarked that the Ont. Rule 666 expressly prohibits such a set-off, and in view of Rule 2 it would not seem that this case would be of any authority in Ontario.

PRACTICE—INTERPLEADER—RIGHT OF CLAIMANT TO RELY ON TITLE OTHER THAN THAT SET UP ON APPLICATION FOR ISSUE.

Flude v. Goldberg (1915) 2 K.B. 157. This was an interpleader issue to try the right to goods seized in execution under a judgment against one of two partners—and which were claimed by the other partner as his property. An issue had been ordered to try this question. At the trial of the issue it appeared by the evidence that the goods were the property of the partnership and the question was whether the claimant could rely on this title, having failed to establish his separate claim. The issue was tried in the County Court and judgment given in favour of the execution creditors, but on appeal, the Divisional Court (Ridley, and Lawrence, JJ.), held that this was wrong. Ridley, J., says: "In my opinion, the fact of his having claimed under a title which he was found not to have, did not estop him from relying on a title which he was found to have as against the execution creditors who had no title at all."

CERTIORARI—CROWN OFFICE RULE—TIME LIMIT LAID DOWN BY RULE—RULE NOT BINDING ON CROWN.

In *The King v. Amendt* (1915) 2 K.B. 276, the Court of Ap-

peal (Lord Reading, C.J., and Eady, L.J., and Bray, J.), on appeal from a Divisional Court, decide that a Rule of the Crown office limiting the time within which a writ of certiorari may issue, is not binding on the Crown and has no application where the writ is applied for on the fiat of the Attorney-General. The time limit laid down by Ont. Rule 1285 (see Holmested's Jud. Act, p. 141), and by the Ont. Jud. Act, s. 63 (7) (a) would therefore appear, on the authority of this case not to apply to applications made by the Attorney-General assuming that he may, and does proceed, under those provisions.

CONTRACT—ILLEGALITY—FRAUD ON BANKRUPTCY LAWS—AGREEMENT WHEREBY CREDITOR IS TO GET PART OF TRUSTEE'S REMUNERATION.

Farmers' Mart v. Milne (1915) A.C. 106. This, though an appeal from a Scotch Court, nevertheless deals with a question in which Scotch and English law are similar. The plaintiffs were a firm of land agents, and they agreed with their own manager that he should undertake trusteeships in bankruptcy on the terms that his remuneration as such trustee should be pooled with the receipts of the firm for any business done by the firm for any such estate of which he should become trustee, and that the net proceeds, after deducting any debt due by such estate to the firm, should be divided in certain specific proportions between the firm and the manager. The House of Lords (Lords Dunedin, Atkinson and Shaw) held that this was an attempt on the part of the plaintiffs to eke out the dividends payable to them as creditors out of such estates by sharing in the trustees' remuneration, and that such a transaction was a fraud on the bankruptcy laws, which aimed at an equal distribution among all creditors, and was, therefore, illegal and consequently not enforceable.

LOCAL GOVERNMENT—DWELLING-HOUSE UNFIT FOR HABITATION—CLOSING ORDER—PROCEDURE—RIGHT OF OWNER TO BE ORALLY HEARD—RIGHT OF OWNER TO INSPECT INSPECTOR'S REPORT—"NATURAL JUSTICE."

Local Government Board v. Arlidge (1915) A.C. 120. This case, though turning on the provisions of an English statute conferring powers on local authorities to inspect and order the closing of premises found unfit for human habitation, is deserving of notice here. The Act authorised the local authority to make a closing order, and provided that an appeal might be had from such order

to the Local Government Board, and that the procedure on such an appeal shall be such as the Board may by rules determine. A closing order having been made, an appeal was had to the Board, on which the appellant claimed the right to see the report of the inspector on which the Board was proposing to act, and he also claimed he had a right to be heard orally. The rules of the Board made no provision for any such alleged rights, and they were denied, but the appellant had an opportunity to put in any statement in writing he saw fit. The Act and rules provided that the Board should not dismiss any appeal without having first held a public local inquiry. The public inquiry having been made by an Inspector, the Board acted on his report and dismissed the appeal, which dismissal, the appellant contended, was invalid (1) because it did not shew on its face by which officers of the Board the case had been decided; (2) because of the denial of inspection of the inspector's report and refusal to hear the appellant orally. The House of Lords (Lord Haldane, L.C., and Lords Shaw, Moulton and Parmoor) reversed the decision of the Court of Appeal, which had given effect to the owner's contention. The House of Lords considered that the Act conferred administrative powers on the Local Government Board, and, in the exercise of these powers, the Board was not necessarily to be governed by the procedure in Courts of justice, and that there was nothing objectionable in the way they had carried out their duties, and that the owner had no legal right either to inspect the report or to be heard orally. Their Lordships rather flout the idea that "natural justice" can have anything to do with such proceedings; indeed, one may infer that "natural justice" has in Courts of law no existence apart from legal justice.

CANADA—LEGISLATIVE AUTHORITY OF DOMINION AND PROVINCIAL PARLIAMENTS—COMPANY INCORPORATED BY DOMINION—RESTRICTION OF CORPORATE RIGHTS OF DOMINION COMPANY BY PROVINCIAL LEGISLATION—B.N.A. ACT (30-31 VICT. c. 3), ss. 91-92.

John Deere Plow Co. v. Wharton (1915) A.C. 330. In this case the important question presented for decision was whether a provincial legislature can validly impose restrictions on companies incorporated by Dominion authority, so as to prevent them from doing business in the province unless they are registered or licensed under the Provincial Act. Two actions were consolidated. In the one a director of a Dominion corporation,

against the corporation, sought to restrain the corporation from doing business in British Columbia until it had been licensed or registered under an Act of that province. The British Columbia Court had granted the injunction as prayed. In the other action the plaintiffs sought to recover the price of goods sold, and the defendant pleaded that the action was not maintainable because the plaintiffs (a Dominion company) was not licensed or registered under the laws of British Columbia, and in this case also the Supreme Court of British Columbia had given effect to the defence. The Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Moulton and Sumner, and Sir Charles Fitzpatrick and Sir Joshua Williams) allowed the appeal, and reversed the judgments of the Court below, their Lordships holding that, under the B.N.A. Act, s. 91, the Dominion Parliament has power to prescribe the extent and limits of the powers of the companies which it incorporates, and that such status and powers cannot be destroyed or limited by any Provincial Legislature; and a provincial Act of B.C. providing that Dominion companies must be licensed and registered under that Act was held to be *ultra vires* of the Provincial Legislature.

BY-LAW STOPPING UP LANE—POWERS OF MUNICIPAL CORPORATION—R.S.O., c. 192, s. 472.

United Buildings Corporation v. Vancouver (1915) A.C. 345. This was an appeal from the Court of Appeal of British Columbia. The proceedings were instituted against the City of Vancouver to quash a by-law of that city. The corporation had a statutory power to stop up lanes and also to lease land of lanes so stopped up, but, in order to grant any bonuses, the by-law required the assent of the electors. In pursuance of its powers, the corporation stopped up a certain lane, and conveyed the land to a company which owned the land on either side of the lane, for a term of 25 years, at a nominal rent, upon its conveying to the corporation a piece of land over which the lane could be and was diverted. It was objected by the applicants that this transaction was in the nature of a bonus to the company, and that the by-law authorizing the lease was invalid for want of the consent of the electors; also on the ground that it was not in the public interest, but solely in the interest of the company to which the lease had been made. It appeared that the application for diverting the lane had the consent of the majority of the owners of property in the lane, although it was strongly opposed by the present appellants. Clement, J., who heard the motion, dis-

missed the application, and his judgment was affirmed by the Court of Appeal of British Columbia. The Judicial Committee of the Privy Council (Lords Moulton, Parker and Sumner), without calling on the respondents, dismissed the appeal, there being no evidence of any bad faith or improper conduct on the part of the municipality, and their Lordships being of the opinion that a transaction does not constitute the giving of a bonus "merely because steps taken in the public interest are accompanied by benefit specifically accruing to private persons," though if the only parties benefited had been the company to whom the lease was made, it might have been otherwise.

CANADA—ALBERTA RAILWAY ACT (STATUTE OF ALBERTA, 1907, c. 8), s. 82 (3)—RAILWAY ACT (R.S.C., c. 37), s. 8—B.N.A. ACT (30-31 VICT. c. 3), ss. 91, 92.

Attorney-General of Alberta v. Attorney-General of Canada (1915) A.C. 363. By the Railway Act of Alberta, Stat. 1907, c. 8, s. 82 (3), it is provided that a railway company authorized by that Act may, with the approval of the Lieutenant-Governor, take possession of, use or occupy the lands belonging to any other railway company, and purports to apply that provision to every railway authorized otherwise than under the legislative authority of the province, "in so far as the taking of such lands does not unreasonably interfere with the construction and operation" of the railway whose lands are taken. The question submitted for the consideration of the Judicial Committee (Lord Haldane, L.C., and Lords Moulton and Sumner and Sir Charles Fitzpatrick and Sir Joshua Williams) was whether this provision was valid so far as it purported to affect railways under Dominion control, and their Lordships held that it was not, and that it would not be *intra vires* even if the word "unreasonably" were omitted, affirming the judgment of the Supreme Court of Canada, 48 S.C.R. 9.

VENDOR AND PURCHASER—TIME FOR COMPLETION—UNNECESSARY DELAY—NOTICE MAKING TIME OF THE ESSENCE—REASONABLENESS OF NOTICE—RETURN OF DEPOSIT.

Stickney v. Keeble (1915), A.C. 386. This was an action by a purchaser of land to recover his deposit on the ground of failure to complete pursuant to notice. The contract did not provide that time should be of the essence of the contract. The day fixed for completion was October 11. At the date of the contract the defendants had no legal title to the land, it being

a part of an estate which the defendants had agreed to purchase as a speculation, and which they re-sold in lots to twenty-three purchasers. The defendants delayed completion of the plaintiff's contract in order to complete their title, and to procure the simultaneous execution of the conveyances to the sub-purchasers. On January 12 the plaintiff, who had repeatedly pressed for completion, gave notice to the defendants to complete in a fortnight or return the deposit. At the date of the notice the conveyance to the plaintiff awaited approval by certain mortgagees, and execution by eight parties residing in various parts of England. The Court of Appeal held that the plaintiffs had acquiesced in the delay; but the House of Lords (Lords Loreburn, Atkinson, Mersey, Parker, and Parmoor) came to a different conclusion on the facts, and held that the reasonableness of the notice must be determined by what had previously taken place between the parties, and in the circumstances of this case the notice was sufficient, and the plaintiff was therefore entitled to succeed.

FIRE INSURANCE POLICY—ARBITRATION CLAUSE—CONDITION PRECEDENT TO ACTION—REPUDIATION OF CLAIM—WAIVER.

Jureidini v. National British & I. M. Insce. Co. (1915) A.C. 499. This was an action to recover the amount of a fire insurance policy. The policy contained the usual arbitration clause. The defendants before action repudiated the plaintiff's claim *in toto* on the ground of fraud and arson. They now set up the arbitration clause, and the Court of Appeal gave effect to the contention and held that the action was not maintainable. The House of Lords (Lords Dunedin, Atkinson, Parker, and Parmoor), however, held that as the defendants had repudiated the claim on a ground going to the root of the contract, it precluded the defendants from setting up the arbitration clause as a bar to the action.

Reports and Notes of Cases.

Province of Alberta.

SUPREME COURT.

Scott, Stuart, and Walsh, JJ.]

[21 D.L.R. 97.

YOUNG v. SMITH.

1. *Corporations and Companies—Share Subscription Obtained by Fraud or Misrepresentation.*

A representation by the seller of company shares that other shareholders had paid cash for their shares is a material representation.

2. *Contracts—Rescission — Misrepresentation — Materiality—*

The test of a material inducement on a claim to rescind a contract for misrepresentation is not whether the buyer would have acted differently if the misrepresentation had not been made, but whether he might have done so; it is sufficient to prove that in the ordinary course of events the natural and probable effect of the misrepresentation was to influence the mind of a normal representee in the manner alleged.

3. *Contracts—Rescission — Misrepresentation — Materiality—Inducement.*

Both materiality and inducement are questions of fact on a claim to rescind a contract for misrepresentation.

Young v. McMillan, 40 N.S.R. 52, considered.

ANNOTATION IN D.L.R. ON ABOVE CASE.

A contract to buy shares induced by misrepresentation may be rescinded at the option of the deceived party. If the purchase money has been paid to the company he may bring an action of rescission. *Re London & Staffordshire Co.*, 24 Ch.D. 149.

He must, however, act promptly upon the discovery of the misrepresentation and a short delay has been held to be sufficient to deprive him of the right to rescind. *Petrie v. Guelph Lumber Co.*, 11 Can. S.C.R. 450; *Re Scottish Petroleum Co.*, 23 Ch.D. 413; *Beatty v. Nealon*, 12 A.R. 50. And means of knowledge as distinguished from actual knowledge, may be sufficient to

debar him. *Ashley's Case*, 9 Eq. 263. He may also lose his right of rescission by conduct such as attending or voting at a meeting of the shareholders. *Sharpeley v. Louth*, 2 Ch.D. 664, or by attempting to dispose of his shares or executing a transfer of same. *Crawley's Case*, 4 Ch. 322, or by making a payment on account of the stock. *Shearman's Case*, 66 L.J. Ch. 25. See also *Nelles v. Ontario Investment Association*, 17 Ont. R. 129; *Parker & Clark on Company Law*, 73.

The payment of money on account of shares, the act of participating in the affairs of the company, the knowingly allowing the name to appear as a shareholder or director and the like have always been considered as important, but not conclusive evidence. Each case must depend upon and be governed by its own circumstances. *Bank of Hamilton v. Johnston*, 7 O.W.R. 111, and *McCallum v. Sun Savings Loan Co.*, 1 O.W.R. 226.

Where a shareholder in an action for calls has put in a counterclaim for rescission, he is entitled to raise all the defences in the winding up that he could have raised in such action. *Re Pakenham*, 6 O.L.R. 582.

A mis-statement of the names of the directors has been held to be a material mis-statement. *Re Scottish Petroleum Co.*, 23 Ch.D. 413. So also a statement that stock has been subscribed when in reality it has been or is to be allowed in paid-up shares to a promoter or vendor. *Arnison v. Smith*, 41 Ch.D. 348.

A statement of intention or words to the effect that something will be done, is not regarded as a statement of fact. *Edgington v. Fitzmaurice*, 29 Ch.D. 459.

Where the statement is ambiguous the applicant is entitled to put any reasonable construction on it, and the company will be bound by such construction. *Arkurright v. Newbold*, 17 Ch.D. 301. A statement that the company's process is a commercial success is regarded as a statement of fact and not an expression of opinion. *Stirling v. Passbury Grains*, 8 T.L.R. 71; *Greenwood v. Leather Shod Wheel Co.* (1900), 1 Ch. 421. For further cases illustrating the principles see *London and Staffordshire Ins. Co.*, 24 Ch.D. 149; *Ross v. Estates Investment Society*, 3 Ch. 682; *Alderson v. Smith*, 41 Ch.D. 348.

If the effect of a document is stated and it is also stated that it may be inspected at a certain place the subscriber is entitled to accept the statement as to the effect of the document. He is not bound to go and examine the documents for himself. *Redgrave v. Hurd*, 20 Ch.D. 1; *Smith v. Chadwick*, 9 A.C. 187.

An unfounded statement recklessly made by the company's agent in order to obtain a subscription for company shares, without any reasonable basis for his opinion, that the company would earn 30 per cent. dividends on its shares, may be relied on as a misrepresentation avoiding the subscription. *Pioneer Tractor Co. Ltd. v. Peebles*, 15 D.L.R. 275.

A subscriber for shares is not precluded from questioning the truth of statements contained in a company prospectus by an admission made

by him before subscribing for his shares, to the effect that he was not influenced by anything contained in the prospectus, where he afterwards gave his subscription in reliance on false statements in the prospectus and oral misrepresentations by an agent of the company. *Pioneer Tractor Co. Ltd. v. Peebles*, 15 D.L.R. 275; *Aaron Reefs v. Twiss*, [1896] A.C. 273, 280; *Edgington v. Fitzmaurice*, 55 L.J. Ch. 650, 653; and *Peek v. Derry* (1880), 37 Ch.D. 541, 584, specially referred to.

A statement in a prospectus that thousands were interested in a company, which guaranteed its financial success, when, as a fact, there were not over one hundred and twenty-five shareholders, is a false representation sufficient to invalidate a subscription for shares made in reliance thereon. *Pioneer Tractor Co. Ltd. v. Peebles*, 15 D.L.R. 275.

A plaintiff suing the company for rescission had learned on January 24, 1904, that material representations, upon which he had been induced to purchase shares in the defendant company on June 24, 1903, were untrue. On February 16 and on March 8, 1904, he demanded at meetings of the company a return of the purchase money. Neither demand was assented to, and on April 13 the company communicated to him a formal refusal. A suit for rescission was commenced by him on December 27, following. It was held that the suit was barred by delay, and that directors who adopted a resolution to sell shares of the company and to employ a broker for the purpose were not responsible in damages for misrepresentations in a prospectus issued by the broker, to a holder of shares who had purchased relying upon the prospectus, it having been issued by the broker as the agent of the company without their authority. *Farrell v. Portland Rolling Mills Co.*, 38 N.B.R. 364.

In an action by a corporation to recover the amount alleged to have been subscribed by the defendant for shares in the corporation, the defendant testified that he was induced to subscribe by the representations of the plaintiff's agent that two other named persons had each subscribed \$10,000 of shares upon the condition that subscriptions for \$50,000 were obtained by a certain date; that the defendant's subscription was required to make up the \$50,000; and that his subscription would not be binding unless the \$50,000 was fully subscribed by the date named. It was proved that neither of the named persons had subscribed or promised to subscribe for \$10,000 each, either conditionally or unconditionally, that they did not do so at any time after the defendant's subscription, and that \$50,000 was not subscribed on or before the date named. The defendant's testimony was not contradicted, the plaintiff's agent having died some years before the commencement of the action; and the trial Judge credited the testimony. The Court held the evidence sufficient without direct corroboration, and that in the absence of facts or circumstances of countervailing weight, should be accepted. It was also held that the plaintiff corporation was bound by the material representations of the agent, who was duly authorized to solicit subscriptions for shares, whether those representations were made in good faith and with a belief in their fulfilment or not. *Ontario Ladies College v. Kendry*, 10 O.L.R. 324 (C.A.).

Scott, Stuart, Beck, and Simmons, JJ.]

[21 D.L.R. 321.]

BRAUCHLE v. LLOYD.

1. *Contracts—Rescission—Grounds—Misrepresentation—Waiver.*

The right to set aside a contract for misrepresentation by the other party which was unintentional and did not amount to fraud may be waived or released by payments made thereon after the untruth of the misrepresentation had been clearly revealed.

Re Bank of Hindustan, 42 L.J. Ch. 71, applied; *Morse v. Royal*, 12 Ves. 373, and *Moxon v. Payne*, L.R. 8 Ch. 881, distinguished.

2. *Vendor and purchaser—Sale of land—Rescission of—Misrepresentation.*

An innocent misrepresentation as to the value of land on a sale thereof is not upon the same footing as a misrepresentation as to facts which cannot be matters of opinion, as a ground for repudiating the contract in the absence of fraud.

C. C. McCaul, K.C., for the plaintiff, respondent. *Frank Ford*, K.C., and *W. J. A. Mustard*, for defendants, appellants.

ANNOTATION ON ABOVE CASE IN 21 D.L.R. 329.

Rescission of an executory contract will be allowed for a material misrepresentation made by the other party, although the misrepresentation may have been made in good faith in a belief of its truth: *Eisler v. Canadian Fairbanks Co.*, 8 D.L.R. 390, (*Derry v. Peek*, 14 A.C. 337, applied).

Where the purchaser of land or other real estate had taken possession, he could not, at common law, afterwards avoid the contract and reclaim the purchase-money or his deposit, because the intermediate occupation was a part execution of the agreement, which was incapable of being rescinded. And "where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*": *Hunt v. Silk* (1804), 5 East 449; *Blackburn v. Smith* (1849), 18 L.J. Ex. 187, 2 Ex. 783. But in equity, and the equitable rule must now prevail, the mere possession of the property taken under a contract of sale, which is vitiated by fraud or other sufficient cause, does not prevent the court ordering a rescission of the sale and a reconveyance of the property upon equitable terms if the situation of the parties has not been altered in any substantial way: *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221. And the court can give compensation for the possession had by ordering, if necessary, an account of the rents and profits taken, or the payment of an occupation rent: *King v. King* (1833), 1 M. & K. 442. And in the converse case where the vendor is entitled to set aside a conveyance the court will decree the land to stand as security only for what has been paid with interest: *Addison v. Dawson* (1711), 2 Vern. 678; *Aylesford (Earl) v. Morris* (1873), 42 L.J. Ch. 546, L.R. 8 Ch. 484.

Notwithstanding the fact that a vendee was induced to purchase timber lands through the vendor's misrepresentations as to the number of acres thereof, rescission of the contract of purchase will be denied the former after he had entered into a contract with the vendor under which the latter had begun to carry on lumbering operations on the land for the vendee, on the ground that, as the parties could not be placed in their original positions, both contracts must stand: *Eaton v. Dunn*, 5 D.L.R. 604.

The defendant bought a house and lot from the plaintiff for \$1,400, purchase money to be payable by instalments of \$10 a month. The contract further provided that unless the amounts were punctually paid, all payments made should be forfeited and all rights of the defendant cease and determine, and the plaintiff be at liberty to re-enter. The defendant paid the first three instalments, although after paying the third he became aware of misrepresentations of the plaintiff inducing the contract. He refused to pay the fifth instalment, but continued to hold possession. The plaintiff brought this action for possession, and claimed for use and occupation since the last payment on the contract. The defendant counterclaimed for rescission and return of his money paid, and in the alternative damages for the misrepresentations. It was held that the defendant had by his conduct affirmed the contract after knowledge of the misrepresentations, and the plaintiff was entitled to judgment for possession unless the defendant should elect to pay the proper value of the property, having regard to the amount to be deducted as compensation for misrepresentations. If he declined to do this, the measure of the defendant's damages would be the amount which he had paid, less a proper occupation rent: *Webb v. Roberts*, 16 O.L.R. 279 (D.C.).

An executed contract induced by misrepresentation cannot be set aside unless the misrepresentation be fraudulent, but the rule does not extend to executory contracts: *Angel v. Jay*, [1911] 1 K.B. 666; *Abrey v. Victoria Printing Co.*, 2 D.L.R. 208, 3 O.W.N. 868; *Reese River Co. v. Smith*, L.R. 4 H.L. 64; *Adams v. Newbigging*, 13 App. Cas. 308; *Angus v. Clifford*, [1891] 2 Ch. 449, and see *Kinsman v. Kinsman*, 5 D.L.R. 871, 3 O.W.N. 966, reversed on other grounds by 7 D.L.R. 31.

A communication from a person representing a real estate agent made to an owner of land from whom he was trying to get a contract of option for the purchase of his property, that there were no other property transactions going on in the neighbourhood in which this property was situated, although the person making the communication may have known that his principal had been buying other pieces of property in that neighbourhood, is not a misrepresentation *dans causam contractui* which would be ground for rescission, where the parties were dealing at arm's length and there was no duty of disclosure: *Kelly v. Enderton*, 9 D.L.R. 472, [1913] A.C. 191, 107 L.T. 781, affirming *Kelly v. Enderton*, 5 D.L.R. 613, 22 Man. L.R. 227.

An agreement for the sale of land whereby the purchaser was to take the property at "its fair actual value" to be fixed by the vendor may be rescinded, where it appears that the vendor fraudulently made the purchase price of the property several hundred dollars in excess of "its fair actual

value" the purchaser being a woman who lacked business experience and who was unable to form an opinion herself as to the real value of the property, notwithstanding that she went into possession and leased part of the land and sold another part, it appearing that she had not become aware of the fraud until the action: *Larson v. Rasmussen*, 10 D.L.R. 650.

A representation by the purchaser of land to the vendor that he was buying for himself and not for a third party to whom he knew the vendor would not sell, although false, is not a representation material to the contract or one resulting in any damage to the vendor as its immediate and direct consequence, so that a sale which the vendor was induced to make by such false representation cannot be rescinded on the ground of fraud: (*Bell v. Macklin* (1887), 15 Can. S.C.R. 576, followed). *Nicholson v. Peterson*, 18 Man. L.R. 106.

Although it may no longer be open to the party defrauded to avoid the agreement, he may have a remedy for the fraud by action for damages or compensation for the loss occasioned by it, provided the fraud amounts to a substantive cause of action against the party who committed it. *Campbell, C.J.*: *Clarke v. Dickson* (1858), 27 L.J.Q.B. 223, E. B. & E. 148; *Blackburn, J.*, in *Reg. v. Sadlers' Co.* (1863), 32 L.J.Q.B. 337, 10 H.L.C. 404. But in such action he cannot recover any damages which might have been prevented by avoiding the contract when he had the opportunity, if any, of which he did not avail himself; as the loss upon shares which he might have repudiated before they fell in value, or the deterioration of goods which he might have returned: *Ogilvie v. Currie* (1868), 37 L.J. Ch. 541; *Waddell v. Blockey* (1879), 48 L.J.Q.B. 517, 4 Q.B.D. 678. See *Arnison v. Smith* (1889), 41 Ch.D. 348.

Delay is not imputable against the party defrauded until he has knowledge of the fraud, or at least such means of knowledge as he was bound to avail himself of: *Broune v. McClintock* (1873), L.R. 6 H.L. 434; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218. And it lies upon the party against whom the fraud is established and who charges the delay to prove the knowledge in the other party, and the time of acquiring it: *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221; *Arnison v. Smith* (1889), 41 Ch.D. 348. Delay is no answer to a substantive action for damages caused by fraud, at law or in equity, except under the Statute of Limitations: *Peek v. Gurney* (1873), 43 L.J. Ch. 19, L.R. 6 H.L. 377.

Avoidance of the agreement involves a restitution of the parties to their original rights and property; it can be effected only upon this condition, and, therefore, only so long as such restitution is possible: *Western Bank v. Addie* (1867), L.R. 1 H.L. (Sc.) 145, 164; *Bramwell, L.J.*, *Chynoweth's Case* (1880), 15 Ch.D. 13, 20. A contract voidable for fraud cannot be avoided when the other party cannot be restored to his *status quo*; for a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded *in toto*, it cannot be rescinded at all; but the party complaining of the non-performance, or the fraud, must resort to an action for damages: *Sheffield Nickel Co. v. Unwin* (1877), 46 L.J.Q.B. 299, 2 Q.B. 214. Where the contract has been completely executed, there cannot be rescission for misrepresentation unless fraudulently made: *Seddon v. North-Eastern Salt Co.*, 74 L.J. Ch. 199, [1905] 1 Ch. 326.

The party who has once determined his election to affirm a fraudulent contract cannot afterwards avoid it upon the discovery of additional incidents of fraud; the effects of such discovery being only to corroborate the fraud which has been waived, and not to revive the right of avoidance: *Campbell v. Fleming* (1834), 3 L.J.K.B. 136, 1 A. & E. 40; *Law v. Law* (1904), 74 L.J. Ch. 169, [1905] 1 Ch. 140. But the disaffirmance of a contract in fact may be supported by any grounds of fraud subsequently discovered: *Wright's Case* (1871), 41 L.J. Ch. 1, L.R. 7 Ch. 55.

Delay in determining his election may operate presumptively in affirmation. Lapse of time without rescinding will furnish evidence that he has determined to affirm the contract; and where the lapse of time is great, it probably would in practice be treated as conclusive evidence to shew that he has so determined: *Clough v. L. & N.W. Ry.* (1871), 41 L.J. Ex. 17, L.R. 7 Ex. 26; *Martin v. Pycroft* (1852), 22 L.J. Ch. 94, 2 DeG. M. & G. 785; *Morrison v. Universal Insce.* (1873), 42 L.J. Ex. 415, L.R. 8 Ex. 197; *Sharpley v. Louth Ry.* (1876), 46 L.J. Ch. 259, 2 Ch.D. 663.

But in every case, if an argument against relief which otherwise would be just is founded upon mere delay, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are: the length of the delay and the nature of the acts done during the interval which might affect either party, and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy: *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221; *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218.

Non-performance for a considerable lapse of time, or under such circumstances as manifest the intention of abandoning it, may be treated as a rescission of the contract: *Davis v. Bomford* (1860), 30 L.J. Ex. 139, 6 H. & N. 245.

Where an agreement had been made between a mortgagor and the mortgagee for the former to give up possession and release all his interest to the mortgagee, which was not acted upon, and twelve years afterwards the mortgagee sold under his power as mortgagee, it was held that the agreement had been abandoned and that the mortgagor retained equity of redemption and was entitled to the surplus of the purchase-money: *Rushbrook v. Lawrence* (1869), 39 L.J. Ch. 93, L.R. 5 Ch. 3. Where land had been sold in lots, subject to covenants with the vendor not to carry on the trade of a beer shop, and the vendor afterwards suffered beershops to be opened and himself supplied them with beer, he was held to have waived and rescinded the covenants over all the lots: *Kelsey v. Dodd* (1882), 52 L.J. Ch. 34.

If the party, upon discovering the fraud, affirms the contract by some unequivocal act, he cannot afterwards revoke his election; and as he cannot approbate and reprobate, he cannot elect to affirm the contract in part, and avoid it in other part, unless the two parts are so severable as to form independent contracts: *Clough v. L. & N.W. Ry.* (1871), 41 L.J. Ex. 17, L.R. Ex. 26; *United Shoe Manufacturing Co. v. Brunet*, 78 L.J.P.C. 101, [1909] A.C. 330, 18 Que. K.B. 511.

Where a person was induced to undertake work for another for a certain sum upon a fraudulent misrepresentation of the quantities, and, after discovering the fraud, continued and completed the work, it was held that he could claim payment only according to the contract price: *Selway v. Fogg* (1839), 8 L.J. Ex. 199, 5 M. & W. 83.

Where a person had been induced by fraudulent misrepresentations to take a lease of a mine and had continued to work the mine after discovery of the truth, he was held to have lost the right of disclaiming the lease: *Vigers v. Pike* (1842), 8 Cl. & F. 562.

Where the party defrauded, after full knowledge of the fraud, gave notice that he insisted on the performance of the contract by a certain time, otherwise he should consider it at an end on the ground of the delay, he was held to have affirmed the contract, though it was not afterwards performed within the time stated: *Macbryde v. Weekes* (1856), 22 Beav. 533.

Misrepresentation by the director of an incorporated company inducing a contract between him and the company gives the company the right, not merely to a future judicial rescission of the contract by a judgment of the Court, but to repudiate the contract by its own act: *Denman v. Clover Bar Coal Co.*, 7 D.L.R. 96, affirmed 15 D.L.R. 241.

Where the plaintiff was induced to buy shares of the capital stock of an insurance company upon its manifesting and expressing a "fixed intention, readiness and capacity" to commence its regular insurance business in a certain city on a fixed date, the existence or non-existence of that "intention" is a fact, and, if the plaintiff entered into the contract to buy and parted with the purchase price on the faith of the statements made in respect of such intention, and those statements were material, his right (if misled) to rescind the contract is the same as if he acted on and was misled by a representation of any other material fact. (*Per Fitzpatrick, C.J.*): *International Casualty Co. v. Thomson*, 11 D.L.R. 634, 48 Can. S.C.R. 167, affirming *Thomson v. International Casualty*, 7 D.L.R. 944.

Bench and Bar.

OBITUARY

HON. SAMUEL BARKER, K.C., M.P.

Mr. Barker who passed away on June 25th last at his residence in Hamilton was at one time as prominent in legal circles as he has since been in political and business lines.

Mr. Barker was born in Kingston on May 28, 1839. He received his earlier education at the London Grammar School, London, Ont., and in that city entered upon the study of the law with the late Henry C. R. Beecher, Q.C. On his admission to the Bar in 1861 he entered into partnership with Mr. Beecher, a connection which continued for many years. In 1872, W. P.

R. Street joined the firm which had one of the largest law practices in Western Ontario, Mr. Street subsequently being promoted to the Bench. In 1872 Mr. Barker became solicitor and counsel for the Great Western Railway Company, removing to Hamilton. His knowledge of railway matters acquired in his professional capacity made him so useful in that line that his services were sought in various railways and other business concerns. In 1900 he was elected to represent the city of Hamilton in the Dominion Parliament, and has since then been a member of the House, and has always occupied a prominent position in the councils of the Conservative party to which he was attached. A man of the highest character, of marked ability, genial and courteous, and a good friend, he will be much missed by an extensive circle.

Robert Edward Harris, of the City of Halifax, Nova Scotia, K.C., to be a Puisne Judge of the Supreme Court of Nova Scotia, vice Hon. James Johnstone Ritchie, who has been appointed Judge in Equity. (June 28.)

War Notes.

WHAT BRITAIN IS DOING FOR CIVILIZATION.

The Chicago *Daily News* contains a striking tribute to the part Great Britain has played in the war, and shews how she is bending her energies to a colossal task.

Here are some of the things Britain is doing:—

1. Holding the seas for the ships of her Allies as well as for her own.
2. Protecting the coasts of her Allies as well as her own.
3. Struggling in co-operation with the French, to smash the Turks and win the Balkans for the Allied cause.
4. Rendering great aid to French and Belgian troops in resisting the terrible onslaughts of the Germans on the Allied left wing in the West.
5. Making loans and supplying munitions to nearly all her partners in the war.
6. Pursuing a financial policy in Southeastern Europe likely to promote the cause of the nationalities.

7. Putting into the field more than ten times as many men as she ever promised.

8. Guarding her own soil and people against an invasion, which, if it came—and it is believed to be far from impossible—doubtless would be the most savage, the most unsparing, ever known. With how many men? Well, with enough. To hear some people talk, one would suppose that upon Britain were laid the duty of defending every land but her own.

Britain's wealth and sea power and military power are the one sure safeguard against the triumph of Germany's unparalleled war machine. Without Britain's help, France and Russia certainly must have been crushed. Without Britain's whole-hearted participation in the war, who will say that Italy would have ventured to challenge the mighty and merciless Germanic coalition? With Britain out of the struggle, would there have been any hope of the Balkan States daring to move?

And Britain—never forget it—was not compelled to go to the aid of France. Come what might, the most that ever Britain promised France were six divisions—120,000 men. She was not in honour bound to send a single soldier more. She could have stayed out of the war. Germany had begged her to stay out of the war. Disgraced she might have been—as Britons think, must have been—if she had left Belgium and France and European liberty to their doom.

But she could have done this. Few nations are without disgrace, without historical pages they fain would obliterate. Britain was not attacked. France and Russia were attacked. Britain might have awaited the onset—as America is awaiting the onset. Britain might have stood clear, might have husbanded her resources of men and money, might swiftly have prepared, even might have loomed over the stricken adversaries in the end and claimed the hegemony of Europe for herself.

Britain did not do so.

She threw her trident into the scale. She threw her sword into the scale. She threw her gold into the scale—and she is incalculably rich.

She threw into the balance her impressive racial record, her prestige, her unrivalled diplomatic skill. She threw—is throwing—will throw into the balance the whole puissance of her Empire.

And all for what? For the principle—the fruits of the prin-

ciple—of the liberty of the individual against the despotism of the State.

Britain, one can believe, may be the author of some acts of which she is not proud—may have done some things to cause her, looking back upon them with full light, to wish they had never been done. But in this war this old and proud democracy is unfolding, applying, a material strength and a moral splendor that for countless ages after this conflict is stilled will be shining undimmed amid the first glories of history.

Flotsam and Jetsam.

THE PRESS AND THE PUBLIC.—It must now be taken to be the law that any agreement by a newspaper not to publish any comment upon individuals or companies is invalid, and such a contract will not be countenanced in a court of law. This is the decision of the Court of Appeal in *Neville v. Dominion of Canada News Company* (post. p. 229), upholding the decision of Mr. Justice Atkin, who held such an agreement contrary to public policy. Lord Cozens-Hardy's principal ground for holding that such an arrangement was invalid was that such a covenant was in restraint of trade, but he certainly made it clear that, in his opinion, it would also be against public policy. Both Lord Justice Pickford and Lord Justice Warrington based their judgments on the ground of public policy. No one will regret this decision, for agreements for consideration by a newspaper to sell its right of free and unrestricted comment on matters of public concern are reprehensible in the highest degree. It is difficult, however, to see the true distinction, quite apart from questions of conspiracy, between a newspaper selling its right to comment upon particular individuals and a tradesman refusing to sell to particular customers, so far as questions of restraint of trade are concerned. As to the point of public policy, the case seems an extension of that "unruly horse," in order to cover a case where no illegality is alleged or proved.—*Law Times*.

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RIGHTS OF ALIENS IN RELATION TO PROPERTY.

Our English contemporary, the *Law Times*, has drawn attention to the change of law effected in England in 1870 whereby aliens were enabled to acquire, hold and transmit real estate in England as if they were natural-born British subjects.

This privilege had been conceded in Ontario as far back as November, 1849. Here, as in England, no distinction is made between alien friends and alien enemies.

In Ontario the statutory privilege is confined to real estate, but in some other provinces it extends alike to real and personal estate. Laws of this kind are based on the assumption that hospitality will not be abused, but in view of German methods it may perhaps be necessary to reconsider the matter. R.S.O. ch. 108, as we have observed, is confined to real estate, and as regards chattels, real and other personal property, the rights of aliens in Ontario would appear still to be governed by the Common Law.

This distinction of late years has perhaps not been observed, and many leases which have been made to aliens may probably have been forfeitable to the Crown.

Under the Common Law an alien merchant may take a lease only for the purpose of his trade or habitation, "and the privilege applied" only to the merchant himself if he leaves the country, the King, on "office found," may take the lease; and on the merchant's death it does not pass to his personal representatives, but apparently vests in the King. According to Lord Coke a lease to an alien enemy is forfeitable to the Crown even though the lessee be a merchant. An alien, not being a merchant, is not entitled to hold any leasehold except subject to forfeiture to the

Crown on a return to an inquisition finding the lessee to be an alien, which proceeding is technically termed "office found." Where the King takes a lease for forfeiture he does so *cum onere*, and is subject to payment of rent and observance of covenants.

With regard to personal property other than chattels real, aliens have under the Common Law the same rights as British subjects. But under the Merchant Shipping Act, 1894 (57-58 Vict. ch. 60), sec. 1, aliens cannot be registered as owners of British ships.

At Common Law the conveyance by an alien of lands within the jurisdiction was valid except as against the Crown; and the grantee could not set up alienage as against his grantor. An alien's deed of property which is subject to forfeiture is therefore not null and void, but it is voidable by the Crown: see *Doe d. Macdonald v. Cleveland*, 6 O.S. 117.

It would also appear that an alien plaintiff was not, under the Imp. Stat. 5 Geo. II., ch. 7, entitled to issue execution against lands in Upper Canada: see *Wood v. Campbell*, 3 U.C.R. 269; and this restriction appears still to exist under R.S.O. ch. 80, sec. 11, which also, it will be observed, is a provision in favour of "His Majesty" and "any of His subjects."

Rule 533, on the other hand, which is also of statutory force, applies to "any person," and it may be argued that it in effect removes the restriction contained in R.S.O. ch. 80, sec. 11. On the other hand, it may be said that "any person" in Rule 533 merely means "any person" entitled under R.S.O. ch. 80, sec. 11, and is not intended to include "any person" which that section excepts.

Under the former practice the objection had to be raised by plea in bar of execution: see *Wood v. Campbell*, *supra*, but under the present procedure the point, if tenable, may probably be taken by motion to set aside the writ; clear evidence of the alienage of the party issuing the execution would have to be adduced: *Ib.*, and see *Dehart v. Dehart*, 26 C.P. 489.

DEVOLUTION OF ESTATES.

It will be useful for practitioners to note that the R.S.O. 1914 do not include all the provisions now in force relating to the devolution of estates. When the R.S.O. 1897, c. 127, was revised by 10 Edw. 7 c. 56, that Act did not deal with the whole of c. 127, but left unrepealed ss. 22-58: see s. 35. These sections deal with descents before July 1, 1834, and subsequent thereto up to July 1, 1886. They also include some general provisions, viz., that co-heirs shall take as tenants in common: s. 56; that posthumous children shall inherit: s. 57; and that illegitimate children shall not inherit: s. 58. These provisions, which were left in force by 10 Edw. 7 c. 56, have not apparently been repealed by any other statute, and are not included in the Schedule of Acts repealed by 3 & 4 Geo. 5 c. 2; R.S.O. 1914, p. xv.; and Sched. A, *Ib.* p. lvii.

It seems an ill-advised proceeding to have left these important provisions of R.S.O. 1897, s. 127, in this position and without any reference thereto in the present Devolution of Estates Act, R.S.O. c. 119.

LAWYERS FOR LEGAL OFFICES.

It should not be necessary for the profession to remind any Government that lawyers should be appointed to legal offices, yet such action seems to be necessary. A petition has been largely signed by members of the profession in Toronto requesting the authorities to appoint some one from the profession as Clerk of the County Court of the County of York. It is most objectionable that legal offices, which require a person of legal training to properly do the necessary work, should be given to worn-out politicians and others, who are absolutely ignorant of the duties they will have to perform. For example, in the metropolitan city of Ontario a good baker was lost to his trade by being made Clerk of the Surrogate Court; the same Government were so impressed with the commanding presence and stentorian voice of a genial and popular auctioneer that they appointed him a County Registrar. Another Government of a different

stripe of politics thought well to appoint a farmer, who possibly finding politics more paying than farming, became a member of the Provincial Parliament and then procured for himself the position of a County Court Clerk. Such instances might be largely multiplied. As we have often said, if the profession would stick together and insist, not merely their rights, but upon what is really decent in the premises, such outrageous appointments would not be made.

COMBATANTS AND NON-COMBATANTS.

As the civil population, however, becomes more and more involved in the direct conduct of the war, it seems much more likely that the tendency will be to confiscate private property belonging to the enemy. Under the latest system, whereby private individuals are detained and not permitted to leave the country, even for neutral destinations, and under which the receipt of dividends by persons in enemy countries is firmly controlled, we have something very like a temporary confiscation of enemy property. And no war-confiscation can be other than temporary; because permanent confiscations will always form the subject of discussion when the terms of peace are negotiated.

Both at sea and on land the dividing line between the combatant and the non-combatant is becoming blurred. Every citizen is an actual or a potential member of the Army Ordnance Corps. Every merchantman is an actual or potential scout or ram. The protection promised to the invaded populace, on condition of their remaining quiet, has proved illusory. The peaceful dweller at the seaside finds the proximity of a signal station or a railway line draws down on his villa a rain of naval shells. It seems really probable that the theoretical immunity of private property from confiscation, which in Napoleon's time Lord Ellenborough thought so unassailable (in *Wolff v. Oxholm*), will not much longer be maintained.

But it is curious to reflect that, for all that, the nation in

arms is nothing new. Revolutionary and Imperial France was a nation in arms. The Germany of 1814 was a nation in arms; and if ever there was a nation in arms at all, it was the Spain of 1808. Yet that was the very era in which the principle laid down by Franklin and Rousseau was adopted, that war is a struggle between armed forces, which ought not to involve civilians.

The British attempt to intercept provisions destined for France in 1793, on the ground that France could only be brought to terms by creating distress among its civil population, was resisted not only by America, but by Denmark. Under Jay's Treaty of 1794, Great Britain paid damages for the seizures of American goods made in the prosecution of the attempt. Woolsey's remark has always seemed sensible, that a nation which arms the bulk of its population—as the British asserted France had done—would be reduced to famine by the operation of the laws of political economy, without the need for any special interference on the part of its enemy. In fact, the *quasi* siege warfare of modern days must result in the strain on civil supply being too great. The swollen armies in the trenches must sooner or later be depleted for the service of the factories and the fields. And in such a prolonged contest, that nation will be likely to succeed which has the most perfect and reliable civil basis at home for its operations at the front. When this is recognized, it will be difficult to maintain the immunities of civilians in their entirety.—*Law Magazine*.

RIGHTS OF MINORITIES OF SHAREHOLDERS IN COMPANIES.

When an indignant shareholder in a company finds himself in disagreement with the majority of his fellow shareholders at a general meeting, and asks what remedy he has, the answer is that the court will not interfere with the internal management of the affairs of a company, and that for any wrong done to the company it is the company which must sue and not the individual member of the company.

This is known as the rule in *Foss v. Harbottle*, 2 Ha. 461, but the meaning and scope of the rule are not apparent until the cases which lay it down have been examined.

The reason for the rule is set out very clearly by Vice-Chancellor Wigram in *Bagshaw v. Eastern Union Railway*, 7 Ha. 114. He says in that case, "if the act . . . be one which a general meeting of the company could sanction, a bill by some of the shareholders on behalf of themselves and others to impeach that cannot be sustained, because a general meeting of the company might immediately confirm and give validity to the act of which the bill complains." In other words, the court has no jurisdiction. Nor for a mere irregularity is there any equity, for a dissatisfied member to complain. In *MacDougall v. Gardiner*, 1 Ch. Div. 13, the adjournment of a general meeting was moved, and, on being put to the vote, was declared by the chairman who was one of the directors, to be carried. A poll was duly demanded, but the chairman ruled that there could not be a poll on the question of adjournment, and left the room. One of the shareholders sued on behalf of himself and all other shareholders, alleging that that course was taken with a view to stifling discussion. Lord Justice Mellish says in his judgment: "Looking to the nature of these companies, looking at the way in which their articles are formed, and that they are not all lawyers who attend these meetings, nothing can be more likely than that there should be something more or less irregular done at them. . . . Now, if that gives a right to every member of the company to file a bill to have the question decided, then if there happens to be one cantakerous member . . . everything of this kind will be litigated; whereas if the bill must be filed in the name of the company, then, unless there is a majority who really wish for litigation, the litigation will not go on. Therefore, holding that such suits must be brought in the name of the company does certainly greatly tend to stop litigation."

That there must be exceptions to the rule was recognized in *Foss v. Harbottle*: "Corporations like this of a private nature are in truth little more than private partnerships, and, in cases

which may easily be suggested, it would be too much to hold that a society of private persons, associated together in undertakings which, though certainly beneficial to the public, are, notwithstanding, matters of private property, is to be deprived of their civil rights *inter se*, because, in order to make their common objects more attainable, the Legislature may have conferred upon them the character of a corporation."

The exceptions to the rule are (1) where the act done or proposed to be done is *ultra vires* the company, and (2) where there has been fraud or where the majority of a company propose to benefit themselves at the expense of the minority.

As to (1), it is obvious that the act cannot be sanctioned by the company, and therefore the court can interfere: *Simpson v. Westminster Palace Hotel Limited*, 8 H.L.C. 712; *Hoole v. Great Western Railway*, 17 L.T. Rep. 453, L. Rep. 3 Ch. 262.

Vice-Chancellor Wigram in *Bagshaw v. Eastern Union Railway*, *supra*, speaking of acts *ultra vires* the company, says: "A single dissenting voice would frustrate the wishes of the majority. Indeed, in strictness, even unanimity would not make the act lawful."

As to fraud, *Atwool v. Merryweather*, L. Rep. 4 Eq. 464n, is a good example. There M., appearing as sole vendor, sold property to the company for £7,000, of which M. received £4,000 and W. took £3,000. This transaction was not disclosed, and M. and W. together had sufficient votes to secure a majority at the shareholders' meeting: Cf. also *Spokes v. Grosvenor Hotel Company*, 76 L.T. Rep. 679, (1897), 2 Q.B. 124.

It is not fraud for a shareholder or a majority of shareholders to carry a resolution in their favour where they have an interest in the subject-matter of the vote: *Burland v. Earle*, 85 L.T. Rep. 553, (1902) A.C. 83; e.g., a resolution of a general meeting to purchase a vessel at the vendor's price was held to be valid notwithstanding that the vendor himself held the majority of shares in the company: *North-Western Transport Company Limited v. Beatty*, 57 L.T. Rep. 426, 12 A.C. 589. The court, however,

will interfere where the majority of a company propose to benefit themselves at the expense of the minority: *Menier v. Hooper's Telegraph Works*, 30 L.T. Rep. 209, L. Rep. 9 Ch. 350. To give the minority a cause of action, the majority must abuse their powers so as to deprive the minority of their rights and confiscate their interests: *Dominion Cotton Mills Company v. Amyot*, 106 L.T. Rep. 934, (1912) A.C. 546; and see *Alexander v. Automatic Telephone Company Limited*, 82 L.T. Rep. 400; (1900) 2 Ch. 56. Where a scheme for voluntary winding-up and amalgamation of company A and company B by sale and transfer of their assets to a new company is unfair to the independent minority of A company, and is only passed as regards A company by means of a large majority of shares held by B company, who benefit by the scheme, the court will at the instance of the minority of A company stop the scheme by making a compulsory winding-up order, and will not leave the minority to their remedy of being paid out as dissenting members: *Re Consolidated South Rand Mines Deep*, 100 L.T. Rep. 319, (1909) 1 Ch. 491.

When a shareholder wishes to sue, the question arises as to who are the proper parties to the action. A majority may vote in favour of taking action, and then, of course, the proper plaintiff is the company: *Russell v. Wakefield Waterworks Company*, 32 L.T. Rep. 685, 20 Eq. 474. "Where there is a corporate body capable of filing a bill for itself to recover property, either from its directors or officers, or from any other person, that corporate body is the proper plaintiff and the only proper plaintiff": *Gray v. Lewis*, 29 L.T. Rep. 12, L. Rep. 8 Ch. 1035, at p. 1050. Where the act complained of is alleged to be ultra vires the company or unfair to the minority, a single shareholder can sue on behalf of himself and all other shareholders except the defendants, as the form of action is preferable to an action in the name of the company and then a fight as to the right to use its name: *Alexander v. Automatic Telephone Company*, *supra*; *Menier v. Hooper's Telegraph Works*, *supra*; and *MacDougall v. Gardiner*, *supra*, at p. 22. Where it can be established that

the majority of shareholders acted ultra vires or there is fraud, then any shareholder can sue in his individual capacity: *Dominion Cotton Mills Company v. Amyot, supra*. The company of which the shareholder is a member is properly made a defendant, and also any other person or corporation affected by the act in dispute. In *Russell v. Wakefield Waterworks Company, supra*, Sir George Jessel says, at p. 481: "If the subject-matter of the suit is an agreement between the corporation acting by its directors or managers and some other corporation or some other person strangers to the corporation, it is quite proper and quite usual to make that other corporation or person a defendant to the suit because that other corporation or person has a great interest in arguing the question and having it decided, whether the agreement in question is really within the powers or without the powers of the corporation of which the corporator is a member."

With the above limitations, the rule in *Foss v. Harbottle* is inviolable.—*Law Times*.

PROFESSIONAL ETHICS.

Ought a lawyer to defend a prisoner whom he believes to be guilty? Mr. Justice Darling in a case in which a solicitor was the plaintiff made some observations on this familiar problem which ought not to go unrecorded. He protested, says the *London Globe*, against the notion that a lawyer, whether barrister or solicitor, is under an obligation to cease to conduct a case which he realizes to be bad. "If an advocate in the course of a trial for murder comes to recognize that his client is guilty, is he," asked the learned judge, "to say to the court, 'Hang my client'?" To lawyers this counter-query with its self-evident response effectually places beyond the realm of argument the original question. They know that when once embarked on a case they cannot retire therefrom without the consent of the client or the court, and to come before the latter with a revelation of facts damaging to the person they have chosen to defend

is such a breach of confidence that no lawyer worthy of the name could be found to commit it. Moreover, even if a lawyer were himself willing to commit such perfidy, the law itself, having regard to the sacredness of the relation subsisting between attorney and client, would from motives of public policy effectually seal his lips. But how about a lawyer accepting a retainer and voluntarily engaging in the defence of an accused person where he has, prior to his retention, direct knowledge of the prisoner's guilt, derived, we will say, from the accused's own confession? Is not such a defence highly unethical and evidence of a professional depravity in the lawyer who will dare to undertake it, the pseudo-moralist asks? And Lord Macaulay in his glittering style inquires, "Can it be right that a man should, with a wig on his head and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire?" To this rhetorical question we answer simply, "It can." The public hangman or chief electrocutioner can by virtue of his office and under warrant from the state legally and morally deprive of his life at the appointed time a murderer condemned to die; but let any one before such time seek to accomplish his death by lynch law or otherwise, and it is the duty of the sheriff or other proper custodian to defend him to the utmost, even to the point of taking life, although the prisoner may be richly deserving of death. His death, however, the law and good morals say, should be accomplished only by due process of law. The trouble with most detractors of the legal profession is that they fail utterly to comprehend the principle on which advocacy is based. Advocacy implies nothing more than the substitution for an actual litigant of a person professing special skill and learning in litigation to do on behalf of the litigant and in his stead all that he, if possessing sufficient knowledge and ability, might do for himself with fairness to his opponent. Every man, accused of an offence, has a constitutional right to a trial according to law; even if guilty, he ought not to be convicted and undergo punishment

unless on legal evidence, and with all the forms which have been devised for the security of life and liberty. As former Chief Justice Sharswood of Pennsylvania has wisely said: "These are the panoply of innocence, when unjustly arraigned; and guilt cannot be deprived of it, without removing it from innocence." To conduct his defence in accordance with the forms of law, a prisoner, no matter how guilty, is entitled to the benefit of counsel, and moreover, if he cannot procure counsel the law will assign him counsel and force the latter to act under pain of punishment for contempt if he fails to discharge his duties properly. It can therefore not be improper or unethical for an attorney to do what the law can oblige him to do, and this principle is embodied in the codes of professional ethics adopted by many states which provide that "an attorney cannot reject [or is not bound to reject] the defence of a person accused of a criminal offence, because he knows or believes him guilty. It is his duty by all fair and honourable [or lawful] means to present such defence as the law of the land permits, to the end that no one may be deprived of life or liberty, but by due process of law."—*Law Notes*.

TRADING WITH THE ENEMY.

Whatever excuses there may have been during the early stages of the war, on the grounds of ignorance or uncertainty, for committing the serious offence of trading or attempting to trade with the enemy, the sooner the truth is brought home to those who place pocket before patriotism the better. The infliction of fines alone for this breach of the law, owing to the lucrative nature of the business, is useless, and a sharp sentence of imprisonment, in addition to a heavy fine, is the only method of bringing home their position to those who are incapable of realizing their duty as citizens.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

WILL—CHARITABLE LEGACY—INTEREST IN LAND IN ENGLAND OF NO VALUE.

In re Dawson, Pattison v. Dawson (1915) 1 Ch. 626. The Court of Appeal (Lord Cozens-Hardy, M.R., and Phillimore, L.J., and Joyce, J.) have affirmed the decision of Neville, J. (1915) 1 Ch. 168.

WILL—CONSTRUCTION—CHARITABLE LEGACIES—DIRECTION THAT TRUSTEES SHALL DECIDE ANY QUESTION OF DISPUTED IDENTITY—ATTEMPT TO OUST JURISDICTION OF COURT—LATENT AMBIGUITY—PUBLIC POLICY.

In re Raven, Spencer v. National Association, etc. (1915) 1 ch. 673. In this case the construction of a will was in question. By the will a legacy was given to a charitable institution; there was a latent ambiguity as to the institution intended to be benefited; it was claimed by two institutions. The will contained a provision that if any dispute arose as to the identity of the legatees the question should be decided by the trustees of the will. One of the claimants desired the trustees to determine the dispute; the others objected to their doing so. The trustees were willing to act if they had the power to do so. The application was, therefore, made to the Court to decide whether or not the trustees had power to decide the question. Warrington, J., held that the clause in question was an attempt on the part of the testator to oust the jurisdiction of the Court, which was contrary to public policy, and, therefore, void. On the merits he determined that the legatee intended was the one which answered to the name used in the will, rather than another like institution, which carried on its work in the place where the testator lived, and to which, in his lifetime, he had been a subscriber. Evidence to shew that the latter institution was the one intended by the testator to be benefited was held not to be admissible, the description used by the testator not being, in the learned Judge's opinion, applicable indifferently to both claimants, but only to the one in whose favour he decided.

PATENT FOR INVENTION—PETITION FOR LICENCE TO MANUFACTURE PATENTED ARTICLE—PATENTS AND DESIGNS ACT, 1907 (7 Edw. 7, 29), s. 24—(R.S.C. c. 69, s. 44).

In re Robin Electric Lamp Co. (1915) 1 Ch. 780 deserves atten-

tion as casting light on the construction to be placed on the Canada Patent Act (R.S.C. c. 69), s. 44. The application was made under the English Patent Act, which is somewhat wider in its terms, for a compulsory licence to manufacture a patented invention, on the ground that the reasonable requirements of the public were not satisfied by reason of the refusal of the patentee to make, construct, use or sell the invention. The application was heard by Warrington, J., who held that mere default in supplying the patented article, or granting a licence to any individual, does not necessarily amount to a default in supplying the article within the meaning of the statute, and that what is aimed at is a default in supplying the public at large. That the statute does not authorize the granting of a licence to the public generally, but merely to particular applicants.

LANDLORD AND TENANT—COVENANT BY LESSEE NOT TO ASSIGN OR
SUB-LET WITHOUT LEAVE—INTERPRETATION CLAUSE IN LEASE
—COVENANT RUNNING WITH THE LAND.

Re Stephenson & Co., Poole v. The Company (1915) 1 Ch. 802. The defendants were sub-lessees of a lease, which contained a covenant by the lessees not to assign or sub-let without the consent of the lessors. The lease contained an interpretation clause to the effect that the term "lessees" should include the executors and administrators of the lessees. The original lessees, with the consent of the lessors, had sub-let the demised premises to the defendants in 1899. The defendants wished to assign the sub-lease to another company, but the latter company took the objection that it could not do so without the consent of the original lessors. The defendants claimed that, as "assigns" were not named in the covenant nor in the interpretation clause, they were not bound by it; but Sargant, J., who heard the summons, held that, notwithstanding the omission of the word "assigns" in the covenant and the interpretation clause, the covenant ran with the land and bound the assigns, and the omission of the word "assigns" from the interpretation clause could not be held to indicate any contrary intention.

PERPETUITY—SETTLEMENT—GIFT OVER FOR LIFE TO PERSONS IN
ESSE PRECEDED BY INTERESTS VOID FOR REMOTENESS.

In re Hewett, Hewett v. Eldridge (1915) 1 Ch. 810. An ante-nuptial marriage settlement was in question in this case whereby the settlor limited personal property, on the death of the settlor and his intended wife, for all the children of the marriage who,

being sons, should attain 25 years or, being daughters, should attain that age or marry, and, in default of such children, then to his three sisters. The question for the Court was whether, seeing that the gift to the children was void for remoteness, the gift over to the sisters was valid. It was attempted to support the claim of the sisters by what is said in *Gray on Perpetuities*, 2nd ed., p. 226, but Astbury, J., held that he was bound by the decision, *In re Thatcher*, 26 Beav. 365, to hold that the gift over was void. It may be remarked that in *In re Davey, Prisk v. Mitchell* (1915) 1 Ch. 837, this view of the law was recognized by the Court of Appeal as correct: see p. 846.

WILL—CHATELS—LEGAL LIMITATION OF CHATELS TO LIFE
TENANT AND REMAINDERMAN—DEATH OF TENANT FOR LIFE—
CHATELS LOST OR INJURED BY LIFE TENANT—REMAINDER-
MAN—LIABILITY OF ESTATE OF LIFE TENANT—BAILEE—
TRUSTEE.

In re Swan, Witham v. Swan (1915) 1 Ch. 829. This was a summary application, by a remainderman, made in an administration action for compensation out of the estate of the deceased for loss or injury to certain chattels of which, under a will, the deceased was life tenant. It was contested on the ground that the action was in the nature of a claim for a tort to which the maxim *actio personalis moritur cum persona* applied. But Sargent, J., held that the deceased, as life tenant, was in the position of a trustee or bailee of the chattels for the remainderman, and the statement in *Fearne on Contingent Remainders*, 10th ed., vol. 1, p. 414, to the effect that, on the executors' assent to the possession of the first taker, the latter may "be considered as taking in trust for the ulterior legatees, subject to his own anterior beneficial interest therein," was judicially approved, and that the maxim above referred to did not apply.

COMPANY—ARTICLES OF ASSOCIATION—ARBITRATION CLAUSE—
SHAREHOLDERS—ARBITRATION ACT, 1889 (52-53 VICT. c. 49),
ss. 4, 27—(R.S.O. c. 65, ss. 5, 8).

Hickman v. Kent or Romney Marsh Sheep Breeders Assn. (1915) 1 Ch. 881. In this case Astbury, J., decided that, although articles of association neither constitute a contract between a company and an outsider, nor give any individual member special contractual rights beyond those of other members, yet they do constitute a contract between the company and its members in respect of their ordinary rights as members, and,

therefore, a clause in the articles of the defendant company providing for a reference to arbitration of disputes between the company and its members was valid and a sufficient submission in writing within the Arbitration Act, (see R.S.O. c. 65, ss. 5, 8).

FOREIGN WILL—DEVISE OF REALTY IN ENGLAND—DEFECTIVE EXECUTION—BEQUEST TO HEIR—ELECTION.

In re De Virte, Vaiani v. Ruglioni De Virte (1915) 1 Ch. 920. In this case a testatrix, domiciled in Italy, in 1899, made an Italian will purporting to devise real estate in England to Vaiani, and bequeathed personalty to her daughter Maria, Maria being her heir at law. The will was insufficient to pass the realty. The question was whether Maria was entitled to take the land as heiress at law and also the legacy, or whether she was bound to elect which of the two she would take. Joyce, J., decided she was entitled to both, and was not put to election.

COMPANY — PROSPECTUS — MISREPRESENTATIONS — DIRECTORS — UNCORROBORATED STATEMENTS OF PROMOTERS.

Adams v. Thrift (1915) 2 Ch. 21. In this case the Court of Appeal (Lord Cozens-Hardy, M.R., and Pickford and Warrington, L.JJ.) have affirmed the decision of Eve, J. (1915) 1 Ch. 557 (noted *ante* p. 318).

RESTRAINT OF TRADE—EMPLOYER AND SERVANT—MECHANICAL ENGINEERING BUSINESS—RESTRAINT FOR SEVEN YEARS EXTENDING TO UNITED KINGDOM—INTERESTS OF SERVANT AND PUBLIC.

Morris v. Sazelby (1915) 2 Ch. 57. This was an action to restrain the defendant from committing a breach of an agreement whereby he bound himself that he would not, within seven years from leaving the plaintiffs' employment, be concerned in the sale of pulley blocks, overhead runways, electric overhead runways, and hand overhead travelling cranes, or any part thereof, or be concerned or assist in any business connected with the sale or manufacture of such machines within the United Kingdom. The plaintiffs were manufacturers of such machines. The defendant contended that the agreement was void as being in undue restraint of trade. Sargant, J., who tried the action, although of the opinion that, from the point of view of the plaintiffs, the restraint was not unreasonable as to either time or space, yet considered that, from the point of view of the em-

ployee and the public, that it was unreasonable, as the public would be unreasonably deprived of a great deal of skill and experience acquired by the defendant in the course of his employment, which was not of a confidential character, acquired on behalf, or for the benefit, of the plaintiffs; and with this opinion the majority of the Court of Appeal (Lord Cozens-Hardy, M.R., and Joyce, J., concurred, Phillimore, L.J., dissenting. The Master of the Rolls also considered that the fact that the defendant had been required to enter into the agreement immediately after attaining twenty-one was unreasonable, a view with which Joyce, J., also appears to concur.

ADMINISTRATION—LEGACY DUTY—IMPROPER PAYMENT OF LEGACY DUTY OUT OF CAPITAL—REFUNDING IMPROPER PAYMENT BY TENANT FOR LIFE.

In re Ainsworth, Finch v. Smith (1915) 2 Ch. 96. This was an application by executors for authority to retain out of growing payments due to a life tenant of a legacy, the amount of legacy duty which the executors had improperly paid out of the capital. One of the applicants was a solicitor and also beneficially entitled as a residuary legatee, and as such interested in the money being refunded, and it was claimed that, as the persons beneficially interested had made the mistake, the money ought not to be ordered to be refunded. Joyce, J., however, determined that the error ought to be rectified, and the over-payment, upon all proper adjustments being made, should be retained out of future payments of the income of the tenant for life.

CONVERSION—TRUST FOR SALE ON REQUEST IN WRITING OF SETTLORS—DEATH OF ONE OF SETTLORS BEFORE REQUEST FOR SALE—FREEHOLD WHETHER CONVERTED INTO MONEY.

In re Goswell (1915) 2 Ch. 106. This was a summary application to determine the question whether, under a trust for sale on the request in writing of the settlors of the trust property, there is an equitable conversion of the trust property into money, where one of the settlors dies before any request in writing to sell has been made. Younger, J., decided the question in the negative.

WILL—POWER OF APPOINTMENT—SPECIAL POWER—DELEGATION OF POWER—EXERCISE OF POWER.

In re Joicey, Joicey v. Elliot (1915) 2 Ch. 115. The facts in this case were that a testator gave a sum of money to trustees

upon trust to pay the income thereof to his daughter for life, and, after her decease, as to the principal in trust for her issue, "for such interests, in such proportions and in such manner in all respects" as she should by deed or will appoint. The daughter made an appointment by will in favour of her issue, who, if they attained 21, were to take absolutely, to which she added this proviso, "Provided always that if the said trustees" (of the testator's will) "shall (if and so far as I can authorize the same) have power from time to time or at any time during the said period of 21 years, in their absolute discretion, to transfer and make over the share or shares for the time being of the appointed funds, of any son of mine who shall have attained the age of 21 years, or any part of such share or shares to such son for his own use absolutely." The present application was made by the surviving trustee of the original testator to determine whether the proviso was valid. Joyce, J., held that it was not, and the Court of Appeal (Lord Cozens-Hardy, M.R., and Pickford and Warrington, L.JJ.) were of the same opinion, it being considered an attempt on the part of the daughter to delegate the power given to her, the proviso being, in effect, more than a mere power of advancement, and authorizing the trustees, in their absolute discretion, to turn a contingent interest into an absolute interest, and thereby destroy the interests which the other children and their issue might, in certain events, become entitled.

COMPANY—ENGLISH COMPANY WITH ALIEN ENEMY SHAREHOLDERS
—RIGHT OF ALIEN ENEMY SHAREHOLDERS TO VOTE AT MEET-
INGS—TRADING WITH THE ENEMY ACT, 1914 (4 & 5 GEO. 5,
c. 87), s. 1 (2)—TRADING WITH THE ENEMY PROCLAMATION,
No. 2, CLAUSE 6.

Robson v. Premier Oil and Pipe Line Co. (1915) 2 Ch. 124.
This is an important decision under the Trading with the Enemy Act, 1914 (4 Geo. 5, c. 87); s. 1 (2). At a meeting of the shareholders of the defendant company the chairman rejected the votes of a certain German bank shareholder, with the result that the nominees of the bank as directors failed to be elected. The German bank had a branch in England, which was being carried on under a licence granted by the Home Secretary, in pursuance of powers conferred on him by Aliens Restriction (No. 2) Order in Council, 1914, made under the Aliens Restriction Act, 1914. The action was brought to set aside the election of directors. Sargant, J., who tried the action, held that during a state of war an alien enemy shareholder in an English company has no right

to vote, and, therefore, that the votes in question were properly rejected, and that the licence to carry on business as bankers in England did not include the right to vote as shareholder of an English company; and with this conclusion the Court of Appeal (Lord Cozens-Hardy and Pickford and Warrington, L.JJ.) agreed.

COMPANY—WINDING-UP—DECEASED INSOLVENT—SHAREHOLDER
INDEBTED TO COMPANY—EXECUTORS' RIGHT TO SHARE IN SUR-
PLUS ASSETS OF COMPANY—SET-OFF.

In re Peruvian Ry. Construction Co. (1915) 2 Ch. 144. This was an application in a winding-up proceeding. One Alt, a shareholder of the company in liquidation, was a debtor of the company. His estate was insolvent. His estate was entitled to a share of the surplus assets of the company; the liquidator claimed that against this share must be set off the debt due by the estate to the company. The executors of Alt, on the other hand, contended that all that could be set off was the amount of the dividend which Alt's estate was able to pay in respect of the debt to the company, and this was the view upheld by Sargant, J.

WAR—TRADING WITH THE ENEMY—PAYMENTS MADE IN ENGLAND
IN DISCHARGE OF LIABILITY OF ENEMY DEBTOR.

King v. Kupfer (1915) 2 K.B. 321. This was a prosecution for trading with the enemy contrary to Trading with the Enemy Act (4-5 Geo. 5 c. 87), ss. 1 (1(b)), 2, and the Royal Proclamation of September 2, 1914. The facts were that the defendant and two brothers, all being naturalized British subjects, carried on business in Frankfurt and London. Two of the brothers managed the Frankfurt business and the accused managed the London branch. The Frankfurt business contracted a debt to a Dutch merchant, and, in order to discharge this debt, the accused, at the request of the Frankfurt branch, paid the amount into a bank in England, with instructions to credit the Dutch creditor therewith. This was done, and was held to be a breach of the Act and Proclamation, as it had the effect of increasing the resources of individuals in Germany and diminishing those of individuals in Great Britain. The accused was found guilty, and a month's imprisonment awarded, and the conviction was affirmed by the Court of Criminal Appeal (Lord Reading, C.J., and Ridley and Atkin, JJ.). The Chief Justice, in delivering the judgment of the Court, said: "We desire to make it quite plain in this Court that the offence of trading with the enemy is a serious offence, and should be dealt with seriously by those whose duty it is to try these cases."

CRIMINAL LAW—ATTEMPT TO OBTAIN MONEY BY FALSE PRETENCES
—WHAT ACTS NECESSARY TO CONSTITUTE ATTEMPT.

The King v. Robinson (1915) 2 K.B. 342. This was a prosecution for attempting to obtain money by false pretences. The facts were that the accused insured his stock-in-trade against burglary. He subsequently pretended to the police that his premises had been entered, that he had been bound and gagged, and his safe broken open and its contents taken by burglars. This was proved to be false and was the pretence relied on. The accused had made no claim on the policy. He was convicted, but the Court of Criminal Appeal (Lord Reading, C.J., and Bray and Lush, JJ.) quashed the conviction, holding that on these facts the defendant could not be convicted of an attempt to obtain money from the insurers by false pretences.

RAILWAY COMPANY—CARRIAGE OF GOODS—OWNER'S RISK—
CHANGE IN TRANSIT OF MODE OF CARRIAGE—DELAY—LIA-
BILITY OF CARRIER.

Gunyon v. South Eastern and Chatham Ry. (1915) 2 K.B. 370. This was an action for damages occasioned by delay in delivering goods. The goods in question were consigned by passenger train at a special rate and subject to a condition that they should be at the owner's risk, except occasioned by wilful misconduct of defendants' servants. Owing to some mistake on the part of the defendants, the goods were transferred from a passenger to a goods train, in consequence of which the delivery of them was delayed, and they deteriorated in quality and the plaintiffs suffered loss. The defendants relied on the conditions, and the County Court Judge who tried the action gave judgment for the defendants; but the Divisional Court (Lawrence and Sankey, JJ.) reversed his decision, holding that, as the defendants had changed the mode of transit, they had themselves broken the contract and were not entitled to rely on the conditions, but were subject to the usual common law liability, and judgment was given in favour of the plaintiff.

SALE OF GOODS—C.I.F. CONTRACT—PAYMENT ON TENDER OF
SHIPPING DOCUMENTS—OUTBREAK OF WAR BEFORE TENDER—
EFFECT OF WAR ON CONTRACT.

Karberg & Co. v. Blythe (1915) 2 K.B. 379. In this case two contracts were in question, for the sale of beans to be shipped from Chinese ports to Naples and Rotterdam respectively, and each contained a provision for payment of contract price in cash

PRACTICE—CLAIM FOR DECLARATORY JUDGMENT—NO CAUSE OF ACTION—"WHETHER ANY CONSEQUENTIAL RELIEF IS OR COULD BE CLAIMED OR NOT"—JURISDICTION—RULE 289—(ONT. JUD. ACT, s. 16 (b)).

Guaranty Trust Co. v. Hannay (1915) 2 K.B. 536. The plaintiffs in this case had *bond fide* purchased a bill of exchange and bill of lading attached, and obtained payment thereof from the defendants, named as drawees. After payment, the defendants discovered that the bill was a forgery, and that no goods had been shipped under the bill of lading, and they were suing the plaintiffs, in New York, to recover the money. The plaintiffs claimed a declaration that, according to the law of England, where the bill was presented and paid, the plaintiffs did not, by presenting it, warrant its genuineness nor the genuineness of the bill of lading attached, and they also claimed an injunction to restrain the defendants from further prosecuting the action in New York, on the ground that it was vexatious and likely to cause injustice and expense. The defendant applied to strike out the claim for a declaratory judgment, on the ground that no cause of action was shown. Bailhache, J., refused the motion, and the majority of the Court of Appeal (Pickford and Bankes, L.JJ.) upheld his decision, but Buckley, L.J., dissented. Pickford, L.J., however, held that a declaration that a person is not liable to an existing or possible action, though not beyond the power of the Court to make, is, nevertheless, one which the Court would rarely make. Bankes, L.J., thought that the claim for the declaration was ancillary to the claim for the injunction, and for that reason was one which the Court might make; whereas Buckley, L.J., was of the opinion that a declaratory judgment could only be properly granted where it is founded on facts shewing a cause of action, and he thought the declaration claimed did not lead to, or bear upon the claim for the injunction. Of course, this case does not determine that, in the circumstances of this case, the declaratory judgment asked would in fact be made, but, in effect, that the claim is not demurrable.

BANKER AND CUSTOMER—ACCOUNT AT ONE BRANCH OF A BANK—DEMAND OF PAYMENT AT BRANCH OTHER THAN THAT AT WHICH ACCOUNT IS OPENED—REFUSAL TO PAY.

Clare v. Dresdner Bank (1915) 2 K.B. 576. The defendants were bankers, having a branch at Berlin and also in London. The plaintiff had an account at the Berlin branch, and demanded payment of the amount there to his credit from the London

branch. Payment being refused, this action was brought, which Rowlatt, J., held would not lie.

FOREIGN JUDGMENT—JURISDICTION OF FOREIGN COURT—CONDITIONAL APPEARANCE—MOTION TO SET ASIDE WRIT—JUDGMENT BY DEFAULT.

Harris v. Taylor (1915) 2 K.B. 580. This was an action on a judgment recovered by the plaintiff against the defendant in the High Court of the Isle of Man. On being served with process in that Court, the defendant entered a conditional appearance, and moved to set aside the writ and service, on the ground that he was domiciled in England, and was not subject to the jurisdiction of the Court of the Isle of Man. The motion was dismissed, and the defendant did nothing more, and judgment was recovered against him by default. Bray, J., gave judgment for the plaintiff on the ground that by his conditional appearance the defendant submitted to the jurisdiction of the Court for the purpose of getting a decision of the Court as to whether or not he was subject to its jurisdiction, and, that point having been decided against him, he was bound by the subsequent proceedings against him, and his judgment was affirmed by the Court of Appeal (Buckley, Pickford and Bankes, L.JJ.).

SHIP—CHARTER PARTY—PROVISION FOR CESSATION OF PAYMENT OF HIRE—"LOSS OF TIME THROUGH DAMAGE PREVENTING EFFICIENT WORKING OF VESSEL FOR MORE THAN 48 HOURS"—LOSS OF TIME EXCEEDING 48 HOURS—CESSATION OF PAYMENT FOR FIRST 48 HOURS.

Meade-King v. Jacobs (1915) 2 K.B. 640. The Court of Appeal (Buckley, Pickford and Bankes, L.JJ.) have affirmed the decision of Bailhache, J. (1914) 3 K.B. 156 (noted *ante* vol. 50, p. 536) to the effect that, under a provision in a charter party providing for the cessation of payment of hire in case of "loss of time through damage preventing efficient working of vessel for more than 48 hours," in the event of the clause taking effect, the cessation of payment dates from the beginning and not from the lapse of the 48 hours.

ASSIGNMENT FOR BENEFIT OF CREDITORS—EXECUTION OF DEED NOT COMMUNICATED TO ANY CREDITOR—REVOCABILITY OF DEED.

Ellis v. Cross (1915) 2 K.B. 654. In this case the simple question was whether or not a voluntary deed of assignment for the

benefit of creditors, which had been executed by the debtor and delivered to the trustee, was revocable before the same had been communicated to any creditor. The question arose on an interpleader issue between an execution creditor and the assignee, and was determined by a County Court Judge in favour of the creditor, on the ground that his execution had been placed in the sheriff's hands prior to the assignment having been communicated to any creditor and while it was, therefore, revocable, and the decision was affirmed by the Divisional Court (Bailhache and Shearman, JJ.).

**TRIAL WITH JURY—RETIREMENT OF JURY TO CONSIDER VERDICT—
STRANGER IN ROOM WITH JURY FOR A SUBSTANTIAL TIME—
INVALIDITY OF VERDICT.**

Goby v. Wetherill (1915) 2 K.B. 674. This was a county court action which had been tried with a jury. It appeared that, after the jury had retired to consider their verdict, the town sergeant, under a mistaken sense of duty, remained in the room with them while they considered their verdict. The County Court Judge, being satisfied by affidavit of the foreman of the jury that the sergeant had in no wise interfered with the deliberation of the jury, upheld the verdict, but the Divisional Court (Bailhache and Shearman, JJ.) held that the verdict, in the circumstances, was absolutely null and void, and a new trial was ordered.

**TRAMWAY—PASSENGER EJECTED UNDER ERRONEOUS BELIEF THAT
HE HAD NOT PAID HIS FARE—LIABILITY OF CORPORATION FOR
ACT OF CONDUCTOR.**

Whittaker v. London County Council (1915) 2 K.B. 676. This was an action for damages against the defendants for wrongful ejection from one of its tram cars by a conductor. The plaintiff was lawfully travelling on the car and had duly paid his fare, but the conductor of the car, acting on the mistaken belief that the plaintiff was travelling beyond the limit for which he had paid, ejected him. The County Court Judge who tried the action dismissed it on the ground that the conductor, in ejecting the plaintiff, was not acting within the scope of his authority, but his decision was reversed by the Divisional Court (Bailhache and Shearman, JJ.), that Court holding that the right of the corporation was not limited to that given by s. 52 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), namely, the right to seize and detain a passenger who refuses to pay his fare until he can be taken before a justice of the peace, but it is entitled to treat

the offender as a trespasser and eject him, using no unnecessary force—therefore, that the conductor had acted within the scope of his authority, and that the defendants were responsible for his act.

EXTRADITION—FRANCE—PRISONER UNDERGOING SENTENCE FOR EXTRADITION CRIME—ESCAPE FROM PRISON.

Ex parte Moser (1915), 2 K.B. 698. This was an application for a habeas corpus by a person who, having been convicted of an extradition crime in France, while undergoing sentence had escaped to England. A magistrate had made an order for his committal for extradition, and the object of the application was to obtain a review of this order. The Divisional Court (Lord Reading, C.J., and Avory and Low, JJ.) held that the order had been properly made and refused the application.

CRIMINAL LAW—INDECENT EXPOSURE—EVIDENCE OF PREVIOUS ACTS—ADMISSIBILITY.

Perkins v. Jeffery (1915) 2 K.B. 702. This was a prosecution for indecent exposure in July. The prosecutrix tendered evidence of herself and others that the accused had committed similar acts in the previous May and on other occasions, with intent to insult the prosecutrix and other females, and the question was whether such evidence was admissible. The Divisional Court (Lord Reading, C.J., and Avory and Sankey, JJ.) held that the evidence of the prosecutrix was admissible for the purpose of shewing that the prosecutrix was not mistaken in her identification and that what was done was done wilfully and not accidentally, and that it was done to insult her. But the Court held that the evidence of other witnesses of previous acts of a similar character by the accused was not admissible unless and until the defence of accident or mistake or an absence of an intention to insult was definitely put forward, and unless it appeared that the other occasions on which the accused had indecently exposed himself were sufficiently proximate to the commission of the alleged offence to shew a systematic course of conduct.

MARINE INSURANCE—CONCEALMENT OF MATERIAL FACT—INNOCENT MISTAKE AS TO MATERIALITY—"HELD COVERED" CLAUSE IN POLICY.

Hewitt v. Wilson (1915) 2 K.B. 739. The Court of Appeal (Lord Reading, C.J., Eady, L.J., and Bray, J.) have affirmed the decision of Bailhache, J. (1914) 3 K.B. 1131 (noted *ante* p. 145).

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Man.] *In re ESTATE OF ROBERT MUIR v. THE* [May 18
TREASURER OF THE PROVINCE OF MANITOBA.

Constitutional law—Provincial legislation—Succession duties—Taxation—Property within province—Bona notabilia—Sale of lands—Covenant—Simple contract—Specially—Construction of statute—Severable provisions—R.S.M., 1902, c. 161, s. 5 (Man.)—4 & 5 Edw. VII., c. 45, s. 4 (Man.)—Appeal—Jurisdiction—Surrogate Court—Persona designata.

M., who died in June, 1908, had his domicile in Manitoba and, under a verbal agreement, had erected elevators for L., also domiciled in Manitoba, on lands belonging to the Canadian Pacific Railway Company in the Province of Saskatchewan. Until fully paid for the buildings were to remain the property of M. who was to retain possession and operate the elevators and all net revenues were to be applied in reduction of the price for which they had been constructed. M. also owned lands in Saskatchewan known as the "Kirkella Lands," which he had agreed to sell to purchasers under agreements under seal, in his possession in Manitoba at the time of his death, by which he remained owner until they had been fully paid for and then the lands were to be conveyed to the purchasers. The agreements contained no specific covenant to pay the price of the lands. The executors denied the right of the Government of Manitoba to collect succession duties in respect of these debts under the Manitoba "Succession Duties Act," R.S.M., 1902, chap. 161, sec. 5, as re-enacted by the Manitoba statute 4 & 5 Edw. VII., chap. 45, sec. 4.

Per curiam.—The debt due under the contract with L. constituted property within the Province of Manitoba and, as such, was liable for succession duty as provided by the Manitoba statute. Also, Davies, J., dissenting, that under the agreements for sale of the "Kirkella Lands" a covenant to pay should be implied, and, consequently, they were specialty debts which, as such, constituted property within the Province of Manitoba and were liable for succession duty there.

Per FITZPATRICK, C.J., and DAVIES, IDINGTON, ANGLIN, and

BRODEUR, J.J.:—The duties imposed by the Manitoba "Succession Duties Act" are direct taxation and, consequently, the legislation imposing them is *intra vires* of the provincial legislature.

Per IDINGTON and BRODEUR, J.J.:—The provincial legislature is competent to impose taxation as a condition for obtaining the benefit of probate.

Per DUFF, J.:—In so far as the statute professes to impose duties in respect of property having a *situs* within Manitoba it is *intra vires* of the provincial legislature. *Rex v. Lovitt*, (1912) A.C. 212, followed. In so far as the statute professes to impose duties on property not having a *situs* in Manitoba, and without respect to the domicile of the owner, the attempted taxation is ineffective as it is not direct taxation within the province and, consequently, *ultra vires* of the provincial legislature. *Cotton v. The King*, (1914) A.C. 176, applied.

Per ANGLIN, J.:—The succession duties imposed by the Manitoba statute are not fees payable for services rendered but constitute taxation subject to the restrictions mentioned in item 2 of section 92 of the "British North America Act, 1867."

Per DUFF and ANGLIN, J.J.:—The provisions of the Manitoba "Succession Duties Act" in respect to taxation which may be *ultra vires* may be construed severably and do not render the statute ineffective as a whole.

IDINGTON and ANGLIN, J.J., questioned the jurisdiction of the Supreme Court of Canada, under subsection (d) of section 37 of the "Supreme Court Act," to entertain an appeal in a matter or proceeding originating in the Surrogate Court of Manitoba.

ANGLIN, J., suggested that in the proceedings provided for by section 19 of the Manitoba "Succession Duties Act" the Judge of the Surrogate Court would act as *persona designata* and that there may not be an appeal from his order to the Supreme Court of Canada.

The judgment appealed from, (24 Man. R. 310,) was affirmed.

W. R. Mulock, K.C., for appellants. *Wallace Nesbitt*, K.C., and *R. B. Graham*, for respondent.

Ont.]

VIVIAN & CO. v. CLERGUE.

[June 24.

Contract—Sale of mining land—Substituted purchaser—Reservation of claim against original purchaser—Forfeiture of second contract—Sale of land to other parties—Effect on reserved claim.

In June, 1903, V. & Co., by agreement in writing, contracted

to sell, and C. to buy, mining property for \$125,000, to be paid \$5,000 down and the balance in annual instalments of \$24,000. The \$5,000 was paid and in March, 1905, when an instalment was overdue and the second accruing, a new agreement was executed, to which C. was a party, for sale of the property to a mining company for the same price and on the same terms. This agreement provided that nothing in it should affect the right of the vendor to claim from C. the amount payable under the original contract up to March, 1905, otherwise the latter was to be merged in the new contract. The mining company made default in their payments and, as provided in their contract, the vendors gave notice that the contract was at an end and, later, sold the property for \$75,000. They then took action against C. for the amount unpaid on the original agreement and recovered judgment. After the final sale of the mine C. applied for and obtained from a Judge an order declaring that V. & Co. were not entitled to enforce their judgment against him except for costs. On appeal from the affirmance of this order by the Appellate Division:

Held, affirming the decision of the Appellate Division, (32 Ont. L.R. 200,) that, by extinguishing the interest of the mining company in the land and then selling it, V. & Co. had put it out of their power to place C. in the position he was entitled to occupy on making payment and had thus disabled themselves from enforcing their judgment.

Appeal dismissed with costs.

W. M. Douglas, K.C., and *Lefroy*, K.C., for appellants.
Shepley, K.C., and *H. S. White*, for respondent.

N.S.] EVANGELINE FRUIT CO. v. PROVINCIAL FIRE [June 24.
INSURANCE CO.

Fire insurance—Statutory conditions—Gasoline "stored or kept" on premises—Supply kept near building—Material circumstance—Non-disclosure.

By a condition in a policy of insurance against fire the policy would be void if more than five gallons of gasoline were "kept or stored" at one time in the building containing the property insured.

Held, that keeping, 15 or 16 feet from said building, under an adjacent platform a barrel of gasoline for supplying the quantity required for daily use was not a breach of such condition.

Held also, reversing the decision of the Supreme Court of Nova Scotia, (48 N.S. Rep. 39,) that as the company, when

issuing the policy, knew that a gasoline engine had been installed in the building for use in manufacturing, and must be deemed to have known that a reasonable supply of gasoline for feeding it would be kept close at hand, the keeping of the barrel where it was placed was not a circumstance material to the risk, non-disclosure of which would void the policy.

Appeal allowed with costs.

Roscoe, K.C., for appellants. Newcombe, K.C., for respondents.

Ont.] UNION BANK OF CANADA v. A. McKILLOP [June 24.
 & SONS.

Company law—Trading company—Powers—Contract of suretyship—R.S.O., 1897, c. 191.

An industrial company incorporated under, and governed by, the "Ontario Companies Act," R.S.O. 1897, chap. 191, has no power to guarantee payment of advances by a bank to another company whose sole connection with the guarantor is that of a customer, and such a contract of suretyship is *ultra vires* and void.

Judgment appealed from, (30 Ont. L.R. 87,) affirmed.

Appeal dismissed with costs.

H. Cassels, K.C., for appellants. C. A. Moss, and J. B. McKillop, for respondents.

N.S.] CAPITAL LIFE ASSURANCE CO. v. PARKER. [June 24.]

Life insurance—Non-payment of premiums—Misrepresentation to insured—Estoppel.

P., in payment of premiums on a life policy, gave his note for one instalment and an overdue balance of another. Shortly before it matured an official of the company, specially authorized to deal with the matter, informed P. that his policy had lapsed owing to the inclusion in the note of the overdue balance which was against the company's rules. In consequence of this representation P. did not pay the note nor tender the amount of another instalment falling due before his death. In an action on the policy by the beneficiary no rule of the company was proved avoiding the policy as stated.

Held, affirming the judgment appealed from, (48 N.S. Rep. 404,) Fitzpatrick, C.J., and Davies, J., dissenting, that the company was estopped, by conduct, from claiming that the policy lapsed on non-payment of the note and subsequent instalment.

Per FITZPATRICK, C.J., and DAVIES, J.:—That the non-

payment of the note could not be relied on as avoiding the policy, but the estoppel did not extend to the effect of failure to pay the portion of the premium which afterwards became due.

Appeal dismissed with costs.

J. J. O'Meara, for appellants. *Mellish*, K.C., and *Findlay MacDonald*, K.C., for respondent.

Ont.] TORONTO POWER CO. *v.* RAYNER. [June 24.

Negligence—Power company—Accident to employee—Injury from supposed dead wire—Duty of employer—Proper system.

A power company is not liable for injury to an employee from contact with an electric wire represented to be harmless but which had, in some way, become charged, when it is shewn that every reasonable precaution had been taken for the safety of employees and there is nothing which proves or from which it can be inferred that the accident was due to the negligence of some person for which the company was responsible.

Per IDINGTON, J. (dissenting):—The only reasonable inference from the evidence is that the accident was caused by negligence; therefore, as decided by *McArthur v. Dominion Cartridge Co.* (1905), A.C. 72, and *Toronto Railway Co. v. Fleming*, 47 S.C.R. 612, it is not necessary to determine precisely how such negligence produced the injury complained of. There was also some evidence of a want of proper system and failure to employ competent persons to superintend the work.

Judgment of the Appellate Division (32 Ont. L.R. 612) reversed, FITZPATRICK, C.J., and IDINGTON, J., dissenting.

Appeal allowed with costs.

D. L. McCarthy, K.C., for appellants. *J. H. Campbell*, for respondent.

Province of Manitoba.

COURT OF APPEAL.

Mathers, C.J.] CHAPMAN *v.* PURTELL. [22 D.L.R. 860.

Moratorium—Word “instrument”—Registered judgment—Suspension of lien.

The word “instrument” as used in s. 2 of the Moratorium Act, Man., does not include a registered judgment for the payment of money so as to suspend or take away the judgment cre-

ditor's right of action for a declaration of lien in respect of the certificate of judgment registered in the land titles office and enforcement of same by a judicial sale.

E. A. Deacon, for plaintiff. No one for defendant.

ANNOTATION ON THE ABOVE CASE IN DOMINION LAW REPORTS.

Etymologically, the word Moratorium is derived from the Latin word *moratorius*, denoting delay and, in the legal sense, it signifies the legal title to delay in making due payment, or a legislative authorization of suspension of payment. In England they are termed as the Postponement of Payment Acts.

A moratorium is either minor or major: a minor moratorium only applies to bills of exchange; a major moratorium includes all other debts except such as may be expressly reserved. In the Franco-Prussian war of 1870, the moratorium declared in France continued until the end of the war. There has been no moratorium in England for over a hundred years, but one has to go back to Napoleon's times to find a parallel for the present emergency. The British moratorium in the present war, as will be noted, may be classed as a major moratorium, since it practically applies to all payments, save those expressly excepted: 33 L.N. 257, 69 L.J. 475.

Moratory laws are an encroachment on vested rights and they should be subject to a strict construction: *Fisher v. Ross*, 19 D.L.R. 69, 72; 24 Man. L.R. 773, 778. They should, therefore, be construed as not to interfere with such rights to any greater extent than is expressly, or by necessary implication, provided: *Chapman v. Purtell*, *supra*, 25 Man. L.R. 78.

Discussing the Effect of War and Moratorium, Mr. Schuster, in his 2nd ed., 1914, at pp. 58, 59, says: "War is not carried on exclusively by the armed forces, and is not exclusively directed against the enemy state as such. The interference with commerce is a weapon which is not less deadly than the bullet or the shell. To injure all subjects of the enemy state, to dry up the springs of their prosperity, to raise the price of their food, and to impede their trade and their intercourse with the world is just as much a patriotic duty as to join in the actual fighting. Justice and equity are to be considered only in so far as the principal object, the infliction of the utmost possible injury to the inhabitants of the enemy country, is not impaired thereby. The Statutes, Orders and Proclamations issued since the outbreak of war do not override the common law rules giving effect to this principle, but are merely intended to make some undecided points clearer, and to fill up some obvious gaps. They certainly do not in any way attempt to mitigate the serious injustice to individuals which some of the rules on the subject entail."

The efficacy of the moratorium was clearly established during the Franco-Prussian War of 1870-71, when the French government from time to time introduced moratory laws and thus maintained the system of

French credit unimpaired during the time of grave national emergency. The working of the system is fully set out in the case of *Roquette v. Overman*, L.R. 10 Q.B. 525. A moratorium enacted by the edict of the Emperor of the French had been extended from time to time by the National Assembly, and provided for a postponement of the date of the maturity of bills of exchange accepted and payable in Paris until some months after the conclusion of the war. The delay in making presentment was excused, and the international validity of the moratory enactments was recognized by the English Courts. It was laid down that the obligations of the acceptor and the indorser must equally be determined by the *lex loci* of performance—that is, the French law: 137 L.T. 376.

The British Parliament by the Postponement of Payments Act, 1914, 4-5 Geo. V. ch. 11, authorizes the postponement of payments of any negotiable instrument or any other payment in pursuance of any contract, by Royal proclamation, and confirms the moratorium of August 3rd, 1914, relating to the postponement of payment of bills of exchange. The effect of the moratorium which is in operation by virtue of the Imperial statute known as the Postponement of Payments Act, 1914, and the various proclamations issued thereunder, may be summarized as follows: It postpones for various periods all payments in respect of any bill of exchange, re-acceptance or negotiable instrument, or to payments due under any contract, excepting—Wages and Salaries; Payments by governmental departments, including payments under the Old Age Pension Acts, the National Insurance Acts, and the Workmen's Compensation Acts; the payments of bank notes; the payments of dividends and interest on trustee securities; payments in respect of maritime freight; payments in respect of rent; payments to or by retail traders in respect of their business. Liabilities when incurred did not exceed five pounds in amount; rates and taxes; debts due from any person, firm or company resident outside of the British Isles; payments in respect of withdrawal of deposits in a savings bank.

The Courts Emergency Powers Act, 1914, and the rules thereunder, are intended for the relief of debtors who for the time being are unable to discharge their debts "by reason of circumstances attributable, directly or indirectly, to the present war." Except as to alien enemies the relief applies:—

- (a) To the enforcement of judgments and orders for the payment of money.
- (b) To the operation of certain remedies which under normal conditions are open to creditors without the intervention of Court, e.g., distress in case of non-payment of rent, resumption of possession of property, exercise of powers of sale on the part of mortgagees not being mortgagees in possession, forfeiture of a deposit in the case of the purchaser's default in the completion of a sale, forfeiture of an insurance policy in the case of the non-payment of a premium.
- (c) To certain proceedings in the Courts by which a creditor under

normal conditions may obtain an order affecting the debtor's property (e.g., ejectment on the part of the lessor, foreclosure on the part of a mortgage), and to bankruptcy petitions.

The moratorium proclaimed under the Postponement of Payments Act, 1914, does not extend to contracts made after August 4, 1914: *Softlaw v. Morgan*, 31 T.L.R. 54.

In *Leving v. Advertiser's Mfg. Co.*, 69 L.J. 678, it appeared that the plaintiff in May sold the defendant company certain goods, of which delivery could be taken by the defendant, up to September 12, 1914. Some of the goods were delivered in July, but as a dispute arose, no further delivery was made. The terms as to payment had been agreed as 2½ per cent., discount for cash in seven days. On September 21, the plaintiff finally commenced action for the goods sold. It was contended that the moratoria did not apply to debts which became due after the date of the first moratorium in August. It was held by the Recorder of London in the Mayor's Court, that the first moratorium postponed all existing liability in respect of contracts up to September 4, 1914, and that the subsequent moratorium postponed liability for payment to October 4, 1914.

In the case of *Happe v. Maunach*, 31 T.L.R. 305, it was held that the moratorium proclamation does not apply to a c.i.f. contract; namely a sale of goods subject to cash payment against documents upon arrival of steamer. In that case it involved a sale of several chests of opium, shipment from Calcutta, subject to cash payment against documents upon the arrival of the steamer in London. When the steamer arrived the seller, apparently apprehending the effect of the moratorium meanwhile declared, refused to tender the documents of shipment unless payment was first made. It was held that the moratorium did not apply to the payment in question, and that it was incumbent upon the seller as condition precedent to the performance of the contract on his part to tender the shipping documents to the purchaser, and his failure to do so will render him liable for the difference of the contract price the purchaser is obliged to pay.

The effect of the proclamations made under the Postponement of Payments Act, 1914, was to give a statutory credit for the period mentioned therein, so that during such period no action was maintainable in respect of a debt coming within the proclamations. If, during the suspensory period, a writ has been issued, the plaintiff is not entitled to judgment, although no appearance has been entered; and the Court, on the facts being brought to its notice, will of its own motion either dismiss the action or remove the writ from the files of the Court. If judgment has been inadvertently allowed to be signed, it will be set aside by the Court when brought to its notice without requiring the defendant to institute a motion for the purpose: *Gramophone Co. v. King* (1914), 2 Ir. R. 535.

When, after money has become due, a writ has been issued in an action to recover the amount, the fact that after the issue of the writ a statutory moratorium temporarily suspended the plaintiff's remedy, is not a defence,

if, before the trial of the action, the temporary moratorium has ceased to apply to the plaintiff's claim: *Glaskie v. Petry*, 59 S.J. 92, 31 T.L.R. 40.

By a proclamation made under the Postponement of Payments Act, 1914, a moratorium was decreed in respect of certain payments, but it was provided that the proclamation should not apply to "any payment in respect of a liability which, when incurred, did not exceed £5 in amount."

In *Jupp v. Whittaker*, 69 L.J. 538, an action was brought to recover the payment of a sum of £20 6s. 2d. on a running account for meat supplied at different dates, consisting of small sums, none exceeding £5. It was contended that the moratorium does not apply to any payment in respect of a liability which when incurred did not exceed £5 in amount. It was held by the County Court, that, when a debt is contracted, being made up of a series of items in one running account, each item as it is incurred becomes so connected with the previous item as to constitute one debt, and there is an implied promise on the part of the debtor to pay that debt. The case is therefore not within the exception, but is subject to the Moratorium Act.

In the case of *Auster v. London Motor Coach Works*, 59 L.J. 24, 31 T.L.R. 26, it appeared that during the currency of the moratorium the plaintiffs issued a writ specially indorsed with a statement of claim for the price of goods sold and delivered, some of the items being less, and some more, than £5. It was held, that as the proclamation did not provide that the Moratorium should "apply to a liability exceeding £5, being an aggregate of a number of liabilities, each of which when incurred was less than £5," the defendants were not entitled to have the writ set aside or the statement of claim struck out, and the action must proceed, but as to the items which were over £5 they could plead the moratorium.

A call upon shares which is payable on a date falling within the moratorium proclaimed under the Postponement of Payments Act, 1914, is a debt within the moratorium, and consequently a resolution of the directors of the company purporting to forfeit the shares for non-payment of the call during the currency of the moratorium, is invalid. Such a resolution is also an attempt without the leave of the Court to take possession of property within the meaning of section 1 (1) (b) of the Courts (Emergency Powers) Act, 1914: *Burgess v. O.H.N. Gases, Lim.*, 59 S.J. 90, 31 T.L.R. 59.

By sec. 1(1) of the Postponement of Payment Act, 1914, and a proclamation issued in pursuance thereof, the payment of any sum due and payable before the date of the proclamation in respect of a contract made before that time was postponed to a specified date. It was held, that rent due and payable before the date of the proclamation could not be recovered in an action in which the writ was issued after the proclamation and before the specified date, because not due and payable at the date of the writ; and that as the right, given by the agreement of tenancy, to re-enter for non-payment was only a security for the rent, it followed that the right also did not exist at the date of the writ and could not be en-

forced in the action: *Durrell v. Gread*, 84 L.J. (K.B.) 130; [1914] W.N. 382.

It was held in *Shottland v. Cabins*, 31 T.L.R. 297, that though a landlord who had levied a distress for rent before the date of the proclamation of a moratorium under the Postponement of Payments Act, 1914, but who had not sold the goods before that date, was not entitled to sell the goods during the currency of the moratorium, yet he was entitled to remove the goods from the demised premises for the purpose of securing his possession of the goods.

The moratorium proclamation in force August 6th, 1914, declared that payments which were postponed, if not otherwise carrying interest, should, if specific demand was made for payment and payment was refused, carry interest at the Bank of England rate current on August 7, 1914; that rate was six per cent. It was held, that a demand by a stockbroker for payment for shares of stock sold for the mid-August account, the settlement of which had subsequently been postponed by the Stock Exchange Committee at a future date, comes within the moratorium proclamation so as to make interest payable on demand for payment at the date of account for which they were sold; and, that the broker was entitled, upon the refusal to take the shares, to sell them without applying to the Court under the Courts Emergency Powers Act, 1914, as the scrip which the purchaser received was not a "security" within the meaning of sec. 1, sub-sec. 1 (b) of that Act: *Barnard v. Foster*, 31 T.L.R. 307, [1915] W.N. 136.

A deposit of money subject to an agreed rate of interest will not, upon a demand for re-payment, subject the amount to the rate of interest current at the Bank of England at the time of the proclamation of the moratorium, but will be governed by the rate fixed by the agreement: *Coats v. Direction Der Disconto-Gesellschaft*, 31 T.L.R. 446, [1915] W.N. 224.

The intervention of the moratorium during the period allowed by a bank for the payment of an overdraft will postpone the date of payment of the overdraft for the morated term, and the bank has no right to refuse payment on cheques drawn meanwhile: *Allen v. London County, etc., Bank*, 31 T.L.R. 210.

On August 6, 1914, a moratorium proclamation was issued, providing that all payments not less than £5 due and payable before August 6 or on any day before September 4, in respect of any cheque drawn before August 4, or in respect of any contract made before that time, should be payable one month after the original due date or on September 4. A cheque was drawn on a bank August 5 and presented for payment on August 10, which was returned by the bank. It was held that the bank was protected by the moratorium, as the case was one of payment in respect of a contract made before August 4: *Flach v. London & South Western Bank*, 31 T.L.R. 334.

Where a debt does not become due by virtue of the proclamations under the moratorium until some date after an act of bankruptcy already com-

mitted, there is nevertheless a debt within sec. 6, sub-sec. 1 (b), of the Bankruptcy Act, 1883, and the debtor can commit an act of bankruptcy: *Re Sahler*, 112 L.T. 133, [1914] W.N. 439.

The Dominion Parliament authorizes a moratorium. By virtue of sec. 4 (e) of the Finance Act, 1914, ch. 3 (Can.), in case of war, invasion, riot or insurrection, real or apprehended, and in case of any real or apprehended financial crisis, the Governor in Council may, by proclamation published in the *Canada Gazette*, authorize, in so far as the same may be within the legislative authority of the Parliament of Canada, the postponement of the payment of all or any debts, liabilities and obligations however arising, to such extent, for such time and upon and subject to such terms, conditions, limitations and provisions as may be specified in the proclamation.

In Ontario, under the Mortgagor's and Purchaser's Relief Act, 1915, ch. 22, sec. 5, in cases of foreclosure of mortgages or agreements for the purchase of lands, no action can be taken without leave of Court, and in such cases the Judge, if he is of opinion that time should be given to the person unable to make any payment by reason of circumstances attributable directly or indirectly to the present war, may, in his absolute discretion, by order, refuse to permit the exercise of any right or remedy, or may stay execution or postpone any forfeiture or extend the time for the expenditure of any money, for such time and subject to such conditions as he thinks fit.

The Manitoba Moratorium Act does not apply to the enforcement of an agreement for the sale of lands situate in another province: *Stanley v. Struthers*, 22 D.L.R. 60.

Section 5 of the Moratorium Act, 1914, Man., which stays actions "for the recovery of possession of the land charged" until after the lapse of a six months' period, does not limit the recovery of a personal judgment for the amount due under a sale agreement for principal and interest, and where an action which was pending when the Act was passed had not proceeded to the entry of final judgment before August 1st, 1914, the limitation of sec. 4 as to actions to enforce a covenant or agreement in respect of lands does not prevent the subsequent entering up of judgment, although it stays proceedings to enforce payment by writ of execution or by registration of the judgment: *Fisher v. Ross*, 19 D.L.R. 69, 24 Man. L.R. 773.

In the case of *Ledoux v. Cameron*, 21 D.L.R. 864, 25 Man. L.R. 71, it was held, affirming the Master's decision, that a registered judgment was an instrument charging land with the payment of money within the meaning of sec. 2 of the said Act, and no proceedings for sale could be taken until after the lapse of 6 months from August 1, 1914.

The same view was taken in the case of *Slobodian v. Harris*, 21 D.L.R. 75, 25 Man. L.R. 74, and it was further held that where the judgment is registered after July 31, 1914, it is a "contract" within the exception of sec. 6, and by virtue of secs. 215-16 of the County Courts Act, so that the restrictions of the Moratorium Act do not apply to prevent an order

for sale being made thereunder within the six months' period: *Slobodian v. Harris*, 21 D.L.R. 75, 25 Man. L.R. 74.

But in *Chapman v. Purtell*, *supra*, 25 Man. L.R. 76, it was held that a registered judgment is not an "instrument charging land with the payment of money," within the meaning of that expression as used in section 2 of the Act; and, although a judgment for the payment of money is spoken of as a contract of record, it is not a contract at all in the ordinary meaning of that word, much less a contract relating to land, and the title of the Act would indicate that it was not intended to affect judgments for the payment of money in any way. In construing the words in section 2, "Notwithstanding any provision in any mortgage of land or agreement to purchase land or in any other instrument charging land with the payment of money," it is proper to apply the *ejusdem generis* rule and to hold that the words "other instrument" do not extend to a registered judgment which is not of the same genus as a mortgage or agreement of purchase.

A foreclosure decree as to the purchaser's interest under a land purchase agreement will, since the Moratorium Act, 1914, be conditional upon the non-payment of the principal, interest and costs within one year from the taxing officer's certificate, together with subsequent interest to the date of payment: *Maxwell v. Cameron*, 20 D.L.R. 71.

On motion for judgment in an undefended action for foreclosure of an agreement for sale, the plaintiff is not entitled to claim that the Moratorium Act does not apply because of an abandonment of the land by the defendant, as provided in sec. 7, unless there is in the statement of claim an appropriate allegation to that effect: *Armstrong v. Siebels*, 24 Man. L.R. 782.

In an action, commenced before the coming into force of the Moratorium Act, and not defended, the vendors claimed specific performance of an agreement of sale of land and in default, rescission and immediate possession, also that, in default of payment, the lands might be sold to realize the unpaid purchase money, interest and costs. It was held, that, so far as regards the relief by sale, the vendors were entitled to a sale at the expiration of a year from the fixing of the time for payment: *United Investors v. Gaynor*, 24 Man. L.R. 781.

An agreement for sale of land whereby the purchaser is to pay the proceeds of one half of the wheat crop yearly until the purchase money and interest is fully paid, is within the exception of sec. 4 (b) of the Moratorium Act, Man., although the agreement is not for delivery of part of the crop itself; but sec. 3 of the Act applies to extend for one year the time fixed for redemption under the Master's report made before the Act came into force: *Haight v. Davies*, 22 D.L.R. 507.

For a recent case on Manitoba moratorium see *Re Real Property Act*, *infra*.

It was held by the Master of Titles at Saskatchewan, that the registration of a transfer subsequent to the issue of the Moratorium Proclamation is not forbidden thereby. Accordingly, where the property in land has

passed in default of payment within the time specified in an order *nisi* for private sale to a specific purchaser, prior to the proclamation taking effect, the transfer to such person may be registered: *Re Moratorium Proclamation* (Sask.), 7 W.W.R. 795.

Finally, it might be well to conclude with the words of 137 L.T. 427, that "having now discussed these various points arising out of the positions as affected by the moratorium, it only remains to draw the reader's attention once more to the King's request of September 1, 1914, that 'all persons who can discharge their liabilities should do so without delay'—advice which we feel confident will be acted on by everyone who has the good of his country at heart."

Obituary.

SIR SANDFORD FLEMING, K.C.M.G., LL.D., M.I.C.E.

Although this distinguished man, who passed off the scene a short while since, was not a member of the legal profession, it is not inappropriate that a legal journal should refer briefly to him as one of our great Empire builders; for all lawyers should be concerned not merely with matters connected with the law in its practical aspect, but should be interested also in those who have been specially used in fostering the growth of the country the laws of which lawyers take their part in interpreting and upholding. This is especially so when so many—in fact, the majority—of our Empire builders have been members of the legal profession.

Sir Sandford Fleming was born in Kirkcaldy, Scotland, in the year 1827, but, as he came to Canada when only 18 years of age, we may well claim him as a Canadian. His achievements and the result of his enterprise, genius and perseverance have gained him a reputation which is historical, and the record of his distinguished services in and for his adopted country will not soon be forgotten.

Largely self-taught in the profession he chose, he joined the staff of the Northern Railway Company, running from Toronto to Collingwood, becoming its Chief Engineer in 1857. In 1863 the importance of the Great North-West having come into view, he was asked to report on the feasibility of connecting the then Province of Canada by rail with the Red River Valley. His capacity for such a position becoming apparent, he was subsequently put in charge of the location of Canada's greatest undertaking, the Canadian Pacific Railway, and was told to find a

route by which a transcontinental railway could pierce the Rockies and find a way to connect the Atlantic with the Pacific. It was no ordinary man who could determine upon the most feasible route and locate the historic passes of the Yellowhead, the Kicking Horse and the one known as Rogers Pass, though the latter was really first discovered by Walter Moberly, and should bear his name. Not one in a thousand of those who now travel in luxury across the North American Continent either know or could realize the genius and enterprise that made such a highway possible. From 1867 to 1871 he was entrusted with the surveying and construction of the Intercolonial Railway. These two great undertakings form an enduring monument as well to his engineering ability as to the energy and patience required in surmounting apparently insuperable difficulties.

In the later years of Sir Sandford's life there was carried into completion a scheme which for many years appealed to him as one of great Empire interest—the spanning of the Pacific with an electric cable, to complete the girdling of the globe and bring into unbroken communication the British Isles with our overseas Dominions.

Sir Sandford was not only a great engineer, but a scientist and writer of repute, but, as an Imperialist, he devoted his influence and enthusiasm to further that worthy cause. He was in all these matters, and in many others too numerous to mention, a man of whom the nation may well be proud.

Those who were privileged to know him in private life and were personally associated with him (as was the writer) will never forget the kind, warm-hearted friend, the genial companion, the brave, self-made man, and the high-minded, cultured gentleman, whom to know was to love.

War Notes.

LAWYERS AT THE FRONT FROM MANITOBA.

The following is a list of the members of the Law Society of Manitoba enlisted for active service: H. Adamson, A.H.J. Andrews, A. J. Anderson, J. K. Bell, R. deB. M. Bird, J. R. Black, H. P. Blackwood, C. Blake, H. C. H. Brayfield, R. R. J. Brown, H. R. Campbell, D. I. Cameron, L. J. Carey, W. G. Currie, H. J. Cowan, S. R. Davis, F. C. S. Davison, J. A. Denistoun, J. R. Dennistoun, R. M. Dennistoun, S. E. Dick, A. E. A. Evans,

F. M. Ferg, C. A. I. Fripp, J. Galloway, M. H. Garton, H. D. A. Gill, W. F. Guild, R. F. Greer, V. J. Hastings, R. E. Higginbotham, A. R. Hill, R. Hoskins, E. L. Howell, G. I. Jameson, C. N. Jamieson, T. H. Jones, A. G. Kemp, J. Love, C. D. H. MacAlpine, R. M. Maclean, W. Martin, E. H. Matheson, A. McBride, A. A. S. McKay, D. McKenna, E. D'H. McMeans, E. R. R. Mills, J. J. Milne, F. F. Montague, A. W. Morley, J. Munro, P. J. Montague, N. Munson, L. A. Naylor, W. F. Newberry, G. F. O'Grady, D. M. Ormond, A. M. Pratt, E. C. Popham, J. S. Price, J. A. Ptolemy, K. Y. Patton, H. R. Reid, J. A. Lincoln-Reed, J. E. Reynolds, R. H. Richardson, H. J. Riley, S. Rosen, G. H. Ross, A. B. Rutherford, G. M. Rutherford, A. M. S. Ross, C. J. deB. Sheringham, F. I. Simpson, R. E. Struthers, J. Sutherland, J. G. Thomson, J. S. Thomson, M. H. Turner, R. Tidmus, C. T. Thomas, O. R. Williams, C. D. Ward, E. B. Wilkinson, J. L. Williams, A. C. Williams, W. M. Wallar.

It has frequently been remarked that since the outbreak of the war there has been a diminution of crime throughout the British Isles and that this is particularly noticeable so far as indictable offences are concerned. Congratulatory reports come not only from London, but from outside countries, both at assizes, sessions and magistrate courts as to the lightness of the calendar. Various reasons have been assigned for this, but the fact is more satisfactory than the reasons given. Human nature seems to require excitement, and perhaps there is sufficient excitement these war times. Possibly the horribleness and solemnity of war has affected the minds of the criminal classes beneficially.

Bench and Bar

JUDICIAL APPOINTMENTS.

Hon. Louis Philippe Pelletier, one of the Judges of the Superior Court, Province of Quebec, to be a Puisne Judge of the Court of King's Bench for said province, vice Hon. Honoré H. A. Gervais, deceased. (August 20.)

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IS CHRISTIANITY PART OF THE LAW?

Some years ago some observations were offered in this journal under the above caption (see vol. 46, p. 81), and it seems, in view of a recent decision, an opportune time to recur to the subject. In the article above referred to, it was pointed out that of recent years there had been a gradual change in the attitude of the Courts to those who denied or impugned the Christian faith, and the conclusion then arrived at, was that, though the law would not actively assist in any way the impugning or denial of the Christian religion, it would no longer condemn persons as criminal who published books or spoke against Christianity, provided they observed a decent regard for morality and the feelings of others; and that, in consequence, though contracts for the purpose of spreading teaching inimical to the Christian religion would not be enforced by a Court of law, yet arguments against the Christian religion would no longer be punished as blasphemous so long as the language employed was not indecent or intemperate.

The policy of the law as then understood was in accord with those principles of toleration which have come to be generally accepted by English speaking people, but it was also conservative of that which was regarded as the animating principle which lies at the root of our institutions, viz., the Christian religion. We were professedly a Christian people, our civilization has its most salutary foundations in our recognition of Christian principles in all relations of life, political and domestic. At the same time those principles are to be enforced and promoted, not by persecution or prosecution of those who dissent from them, but by reason and persuasion. But, while those who seek to undermine those principles were to be tolerated, they could not, accord-

ing to the view then prevailing, call on the Courts of law to assist them in the spread of opinions which, rightly or wrongly, were generally regarded as inimical to the best interests of the commonwealth. But, according to the recent decision of the English Court of Appeal, this view has been further modified, and those who seek to undermine the Christian religion are now not only entitled to toleration, but also to the assistance of the Courts of law in carrying on their propaganda.

In the case of *Re Bowman, Secular Society v. Bowman*, noted in the English Law Times Jour., vol. 139, p. 315, a bequest to a society formed "to promote . . . the principle that human conduct should be based upon natural knowledge, and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action," was upheld as a valid legal bequest. This, it may be seen, is a society which simply ignores God; it is, to all intents and purposes, at least agnostic, if not distinctly atheistic, and its aims and objects are frankly materialistic.

We have a very practical lesson as to the meaning of such doctrines in the catastrophe which has overtaken Europe, and in which the British Empire is now involved. Whoever will care to read the diplomatic correspondence which preceded the declaration of war cannot fail to see that Sir Edward Grey did all that was humanly possible to avert war; that the course which he proposed was eminently Christian, just and reasonable, and that every effort he made in the direction of the maintenance of peace was thwarted by Germany, and that the British Empire was irresistibly drawn into the conflict and could only have refused to take up arms at the cost of sacrificing her honour. The progress of the war has revealed the reason of Germany's action. It has shewn that she was prepared for the struggle as no other nation in Europe. Her plan of campaign, as developed, has shewn that she intended to strike a swift and decisive blow, and, in order to do so, that she regarded a solemn treaty as of no more value than "a scrap of paper," and that it was only by the intervention of the British Empire that her plan failed. Now, all these enormous preparations for war, all this contempt

of treaties, the murder of non-combatants and the frightful outrages inflicted on a peaceful people of which Germans have been guilty, are due to the general acceptance in Germany of the doctrines of which the Secular Society is the exponent. Human conduct, according to the principles of that society, is to be based on natural knowledge—that is, the knowledge which man can acquire by his own unaided efforts, his knowledge of science in all its branches; and this he is to use solely to promote his welfare in this world: and his welfare in this world consists in the things of this world which he can possess and enjoy, and in the attainment of those things he is not to be guided by any principle other than the consideration how he can best attain his object. As interpreted by the Germans, if he can do it by lying, he is not to scruple to lie; if murder is necessary, he may commit murder—the only deterrent to murder is possible punishment; if a course of “frightfulness” is necessary, he is to have no scruple in being as “frightful” as possible. If the killing of non-combatants in cold blood is deemed advisable as a means to attain his material ends, he is not to scruple to kill.

In the present war we have the most striking illustration of this kind of teaching reduced to practice. Bernhardt's book may be regarded as a handbook of the religion of the Secular Society. By Christian people all such doctrines and practices are regarded as nothing more nor less than “the doctrines of devils,” and to pretend that any society or nation is really and truly benefited by the spreading of such opinions is absurd, and, so far from it being of any benefit, it is plain that it would degrade any nation adopting such principles to the level of Germans, and the level they have reached in the scale of humanity is even below that of the “unspeakable Turk.”

And yet the question might well be asked, Have not the same doctrines and the same principles found wide acceptance, not only in England, but in Canada itself? The luxury, the hedonism and practical heathenism which has of late years widely prevailed, largely due to worldly prosperity, are also legitimate fruits of the principles of the Secular Society. The things and the pleasures of this world have been supreme with too many,

indicating a very general forgetfulness of the supernatural, which, according to the Secular Society, is to have no place or part in the conduct of life. The conspicuous neglect of the Lord's Day by large masses of the people, both high and low, has indicated a weakened sense of religious needs, duty and responsibility. Not that church-going is of much use unless the right spirit accompanies it; still some who come to scoff may remain to pray, so that even a perfunctory attendance would seem better than a total forgetfulness of the Almighty from week's end to week's end. The sum of national sin is the aggregate of the individual sins of the people, and it might be well for us all seriously to consider what our individual contribution has been to the sum total, and how far we have been the victims and the exponents of the delusions of the Secular Society. The fearful scourge of war with which we are now being afflicted may and probably is due to our adhesion to and carrying out the principles of the Secular Society, and the sooner we learn that repentance and amendment are the Divine remedies, the better for us all.

It can hardly, therefore, be in accordance with any really sound policy, either public or private, that such principles should receive any support or sanction whatever from the law of a Christian state. If a bequest were made to a society formed for the purpose of promoting seditions and conspiracies against the King's Government, it would be null and void, and no Court of law would give any aid to making it effective. The Government of England is employed in spreading education among the people on Christian principles, and the society in question is formed to counteract and destroy the work of the State and spread certain noxious opinions, the fruition of which would be disastrous to the state, and the Courts of law have declared that a bequest to such a society is a valid and legal bequest. Mr. Justice Middleton, of the Ontario Bench, recently held that a testatrix's direction that her diamond ring should be buried with her was nugatory and the law would give no effect to it; and, in like manner, sound policy would seem to indicate that bequests to a society for the spread of anti-Christian doctrines should receive no support or aid from the Courts of law of a Christian state.

If persons to whom such bequests are made can get them paid without legal assistance, let them do so, but if they have to seek the intervention of the Courts of law, such bequests should be regarded as of no more legal validity than bequests to the man in the moon or directions to bury the money in the earth.

In giving judgment in the case referred to above, the Master of the Rolls is reported to have said: "There had been a great change on the subject within the last 100 years. It was really a question of policy, which varied from time to time. If *Cowan v. Melbourne*, L.R. 2 Ex. 231, was still good law, the legacy could not be claimed," but he did not consider it good law. Not, be it observed, because it had ever been authoritatively overruled, but simply because "public policy" is said to have changed. Lord Davey remarked, in *Janson v. Driefontein* (1902), A.C. 484: "Public policy is always an unsafe and treacherous ground for legal decision." It seems a no better rule than the length of the Chancellor's foot. You have to-day one set of Judges declaring that "public policy" is so and so, and a few years later another set of Judges declaring it to be exactly the reverse. "Public policy" as a ground of decision appears to be judicially utilized for reversing the law of the land without the assistance of the legislature.

No doubt the attitude of the State to religious belief has undergone a change of late years. A man's religion is no longer any test of eligibility for the Bench, and his unbelief in the Christian religion is no bar to his promotion, and in recent years we have had Jews and agnostics administering justice in English Courts, and as was, in effect, said by the late Lord Coleridge, when the State appoints such men to judicial positions, the Courts have necessarily a difficulty in holding that the publication of books advocating the religion or no religion which such persons profess is illegal, provided they are framed with some decent regard to the feelings of others who are Christians. Not only on the Judicial Bench, but for membership in the High Court of Parliament, Christianity has ceased to be a necessary qualification.

Perhaps the attitude of the modern judicial mind and of

Parliament towards religion is that of Pilate, who scoffingly asked, "What is Truth?" in the spirit of one who thinks that there is no such thing. It is to be hoped not; but, at all events, this much is clear, that "public policy," according to the English Court of Appeal, is now in favour of affording the assistance of the Courts to the spread of doctrines inimical to what probably the vast majority of English-speaking people still regard to be the Truth.

In view of the recent decision of the English Court of Appeal, what, it may be asked, ought now to be the answer to the question heading this article? It can hardly be said that the Court of Appeal has denied that Christianity is still part of the law of England, but, rather, that it has decided that it no longer enjoys any right to protection from assault, but may be attacked and societies formed in opposition to it, in just the same manner as any temporal law may be attacked and a society formed for its repeal. Whether this is really sound public policy, we venture respectfully to doubt.

If we have correctly interpreted the decision of the Court of Appeal, then it may be said that Christianity is still part of the law of England, but it has no transcendent position. It is reduced now to the level of merely temporal laws; it is the law of the land only so far as the State and the Courts of law see fit to give effect to it, and is no freer from criticism than any other part of the law.

INTERNMENT OF ALIEN ENEMIES.

The legal position of civilians in this country who, while ceasing, in fact, to be German, have not acquired British nationality has again been raised, and in *Re Liebmann*, Times, 7th inst., an important judgment has been pronounced by a Divisional Court consisting of Bailhache and Low, JJ.

Liebmann was born at Mannheim in 1868, being by descent a subject of Germany. In 1889 he came to England on business, in 1890 obtained a formal discharge from German nationality, but did not take out letters of naturalization in England, and

in this country he has ever since resided and carried on business. In August, 1914, he registered as an alien enemy for reasons of abundant cautela, since he had lost his discharge, and feared that he would be unable to prove his renunciation of German citizenship. Later on he found the document and applied unsuccessfully for exemption from registration. Recently he applied, again without success, to the Home Office Advisory Committee for exemption from internment under the recent order of the Home Office. In August of this year he received from the superintendent of Vine Street Police Station the usual notice, sent by authority of the Secretary of State, informing him that he was about to be interned, and in due course there followed his arrest and internment. To contest the legality of these proceedings and to vindicate his liberty he applied for a writ of habeas corpus, and the matter came last week before a Divisional Court composed of Bailhache and Low, JJ.

Two possible courses were open to the Solicitor-General, who represented the Secretary of State at this hearing. He could either shew cause for the imprisonment of Liebmann, i.e., admit the fact of imprisonment and justify it on the ground of some common law or statutory right vested in the Crown; or he could take a preliminary objection to the applicant's locus standi altogether on the ground that the applicant was an alien enemy, and as such not entitled to appear in our courts. The Solicitor-General adopted this latter course and succeeded, so that no decision as to the rights of the Crown was given on the main issue; but, in fact, all points were argued more or less fully on the hearing of the preliminary objection, so that the difference of procedure was only nominal.

Now, as Mr. Justice Low put it in a singularly lucid judgment, the court had three points before it. The Crown contended (1) that the applicant was an alien enemy, (2) that by internment he had become a prisoner of war, and (3) that the Crown is entitled by virtue of its prerogative in time of war to imprison any person it pleases if it considers such course necessary for the defence of the realm, in which case no writ of habeas

corpus will run while war lasts. Success on any one of these points would be sufficient, but, in fact, it was the second point on which the Court based its decision. As regards the third, while refusing to decide it, the court very naturally intimated that it felt great repugnance to recognizing so wide a power.

As regards the first point, that Liebmann was an alien enemy, the court had simply to follow a recent decision of the Court of Appeal: *Ex part Weber*, ante, p. 692. In that case the applicant for a writ of habeas corpus was a German who, according to German law, had lost his nationality by long absence from his country, but under a recent German statute could take proceedings to regain it if he returned to Germany. The Court of Appeal held that, for purposes of English law, he must be regarded as German—the status of “no nationality” is unknown to our law. Liebmann was in the same boat as Weber, except that he had obtained twenty-five years ago a formal release from German nationality; but this release operates only in the municipal law of Germany, and not in that of England nor in International law, where, according to the better opinion, everyone must have a nationality. Hence Liebmann was an alien enemy. But at common law an alien enemy can neither sue nor obtain the remedy of habeas corpus unless he resides here sub domini regis protectione. Registration of an alien enemy under the Aliens Restriction Act, 1914, and Orders is equivalent to a licence to reside here, and confers this protection and all ancillary rights: *Princess Thurn and Taxis v. Moffitt*, ante, p. 26, (1915) 1 Ch. 58. But the licence, said Low, J., is revocable at any time by the Crown, and the order of internment in Liebmann’s case must be regarded as an implied revocation of the licence to reside conferred by registration. Hence Liebmann reverted to his common status of an outlaw, and could not ask for the protection of the court, though, of course, the imprisonment of civilian enemies is a retrograde step, whether justified by present circumstances we need not here inquire.

Although, however, Mr. Justice Low intimated his determination of the first point in the way we have summarized, the

court preferred to base its decision on the second—which in our view is much more doubtful. It held Liebmann to be a prisoner of war; and, of course, there is abundant authority that a prisoner of war, whether enemy or neutral, cannot apply for a writ of habeas corpus: *Three Spanish Sailors Case* (1779), 2 Wm. Bl. 1324. But how can a civilian (other than a spy) be regarded as a “prisoner of war.” The idea seems a contradiction in terms. Both judges, however, found to the apparent difficulty an ingenious answer. They took judicial notice of the changes in modern warfare, especially as waged by Germany. They concluded from their survey of these changes that civilians residing in a hostile country are of great belligerent value to their national sovereign by sending information of enemy movements, by signalling, and by promoting strikes, disturbances, and unrest in the civilian population. These are military functions, and when the Executive Government chooses to arrest any alien enemy on the ground that he is performing these military functions, the court cannot inquire into the correctness or bona fides of its action. In other words, they applied to this case the well-known plea, “Act of State,” upheld in *Salaman v. Indian Secretary* (1906) 1 K.B. 613, where the Court of Appeal held that it had no jurisdiction to question acts of the Indian Government confiscating the private property of a native ruler in a protected State, provided the Government represented such confiscation to be an arbitrary act of executive authority against that ruler in his capacity as a foreigner: and lucidly analyzed in *Hemchand Devchand v. Azam Sakarlal Chhotamlal* (1906) A.C. 217. The detention of an interned alien converts him into a prisoner of war, and is an “Act of State” into which no court has jurisdiction to inquire. But it may be suggested that, notwithstanding Germany’s military excesses and barbarity, the judgments give a somewhat bold extension to the doctrine of judicial notice. What is the real evidence against Liebmann, and others like him, who have been practically English for many years?

On the third point argued for the Crown, the alleged right of the Executive Government to arrest and detain on grounds of

the public safety any person whatever by virtue of the prerogative as extended in times of war, the court was not in sympathy with the contention of the Solicitor-General, and the use of the prerogative would virtually overrule the Habeas Corpus Acts as against the Crown in times of war. It can only be defended by extending to unwarrantable lengths the much-criticized rule laid down by the Judicial Committee in *Ex parte Marais* (1902), A.C. 109, that while a country is the scene of war the civil courts, although sitting in the theatre of military operations, cannot question the acts of courts martial until the war has terminated. To justify such an extension would be to destroy the distinction between constitutional and despotic Government.—*Solicitors' Journal*.

THE NATIONAL REGISTER IN ENGLAND.

National registration is now more or less completed, if we may judge from the fact that members of the public are beginning to receive their registration certificates. This document is not unlike a passport; it contains a space for the signature of the holder, so that it may prove useful for purposes of identification. Indeed, just as at present, in a certain class of cases, the police ask persons whose movements they are investigating to produce their National Insurance cards, so probably these new certificates will gradually come to be relied on in law and business as a ready means of proving or disproving identity. In this, of course, they resemble a passport. It is also understood that they will be used to assist recruiting officers in their efforts to make a thorough canvass of all eligible persons in their districts. Whether or not they will be used in the immediate future as one instrument in an attempt to introduce compulsory service no one can say. But such introduction, we believe, is only possible by Act of Parliament, and to a limited degree by suspension of the Ballot Act. The common law prerogative right of levy *en masse*, even if it still exists, appears to arise only in the case of sudden invasion or dangerous rebellion (*Broadfort's case*, 1743, Foster 154 *et seq.*). The right of the pressgang as a means of naval recruiting, of course, although doubtless still good law, applies only as against seamen, or, at most, as against the inhabitants of a seaport town.—*Solicitors' Journal*.

WAR AND LAW.

An old Cornishman, cross-questioned after his initiation about Masonic secrets by a curious friend, summarized them as "the nearest thing to nothing." The lay student of International Law is tempted to describe it in similar phrase, and, for that matter, can quote in support of so flippant a definition Rousseau's contention that the laws of war, failing coercive sanction, are no more than chimeras; or the dictum of Clauseworth mentioning." To the legal mind such opinions are heresy unspeakable. International jurists have piled volume upon volume, and though an occasional uneasy suggestion peeps forth here and there in a preliminary chapter that, as the Report of the Royal Commission on Food Supply in Times of War confessed, "there is no absolute guarantee behind international law to insure that its rule will be enforced," natheless, the said Law has been coded and criticised, dissected and defended, iterated and reiterated, discussed and sanctioned at Conference and Convention, hedged about by paper forms and word ceremonies, until in the security of the legal library and council chamber it appeared that "there seems no prospect of any revolutionary change passing over it," for in this enlightened age the days must be past when a Grotius could have need to write, "I saw prevailing throughout the Christian world a licence in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reasons or no reasons; and when arms were once taken up, all reverence for divine and human law was thrown away, just as if men were henceforth authorised to commit all crimes without restraint."

Grotius made initial error in the assumption that the presumed Law of Nature—upon which his scheme of International Law was chiefly based—could not change because it had for foundation human nature itself. But elemental human nature, that alone knows not change, is barely removed from the level of the brute beast. His system, however, according to one authority, "rests secure upon the alternative foundation of general

consent." Vattel, more cautious, spoke of "the just regulations which ought to subsist between nations or sovereign states." And with that "ought" we come to the crux of the matter.

On paper it is acknowledged, by all those Powers that are ranked as "civilised," that certain usages and customs of war—decencies of the battle-field, in fact—certain standards of humane behaviour, are to be observed and maintained in the conduct of operations. On the other hand it is agreed—on paper—that there are actions so reprehensible that no civilised Power would permit its troops to be guilty of perpetration. These actions, known as War Crimes, in the British manual on the laws of land warfare are grouped under four headings: (i) Violation of the recognised rules of warfare; (ii) Illegitimate hostilities in arms; (iii) Espionage and war treason; (iv) Marauding. The first includes among its seventeen sub-headings the use of poisonous and prohibited munitions, the killing of wounded and prisoners, abuse of the Red Cross, illtreatment of inhabitants of occupied territories, and the bombardment of undefended localities. All of these acts stand condemned by the International Conventions at the Hague; they are, in the accepted phrase, illegal. But it is one thing to formulate a law and very other to ensure its observance. Hard words, as the proverb has it, break no bones. Condemnations break no offender. As restraint they are valueless if he wishes to offend, and deems himself strong enough to be able to do so without eventually incurring more material punishment. The vicious circle, in short, ever returns to physical force as the dominant factor in human intercourse; for a legal phrase that has behind it no superior potency carries little weight in the final arbitrament of war, which in its essence is an appeal to strength.

A sovereign head of the Holy Roman Empire, a Papal Pontiff with equal temporal and spiritual powers, could impose his fiat upon jarring nations and determine the forms and ceremonies of war, its licence and its limitations, just so long as he was able to back his decisions with more than wordy threat. Once any

supreme power has vanished, law and rule possess no other bond than the ephemeral tie of consent. No paper forms can secure immunity from disloyal conduct on the part of an opponent. A nation devoid of honour will repudiate them. International laws become, then, a matter of national honour dependent on the existing codes of national ethics. Though the jurists may dress them never so nicely in trappings of fine words and "ruffling garb" of sounding phrase, at bottom these fall into two opposing classes: on the one hand we get the "Golden Rule," or the nearest equivalent thereto compatible with a warfare of any sort, and on the other, baldly:—

“ . . . the good old rule
 . . . the simple plan,
 That they should take who have the power,
 And they should keep who can.”

It is a question how much of the whole matter might not be removed from the sphere of Law and acknowledged to be within the realm of Ethics. There is, in so much of the argument that has waged—and will wage—over International Law, a confusion of the ideas represented by the words *law* and *ethics*. An ethical standard is indicated. It is dubbed law. But that does not make it so. *Law* presupposes the possibility of coercion; failure to comply entails punishment; defiance invites definite reprisal. *Ethics*, on the other hand, suggests a standard, an ideal to be aimed at, right to be encouraged, wrong to be deprecated—but no coercive force. Yet here again we get nothing stable. It is a truism to remark that morals are a question of chronology and latitude. Nor will religion—in its widest sense—offer firmer foundation, for not all religions count human life as sacred, far less human suffering as an ill to be decried.

There is, then, no permanent basic ground for international ordinances to be gained from religion or ethics. But some such holdfast must of necessity be secured. Though Grotius erred in certain of his deductions and theories concerning the Law of Nature, in fact he touched on the one supreme authority that

can and does rule human fluctuations. Natural laws alone are binding, for Nature imposes her own punishments, and can coerce where man's potencies fail. Her processes are ruled by laws immutable. Chaos is inimical because it is the opposite to law, is prohibitory to progress. It can therefore never be permitted by Nature entirely to swamp humanity. So man makes his codes of law, builds up his standards of international ethics, till what time a stronger or more ruthless may come and let chaos, seemingly, loose again upon a tortured world.

The final test, therefore, is not so much what is or is not lawful, but what is or is not expedient. That Nature's action must needs be lawful was the excuse advanced by seventeenth-century theorists for the use of fire and smoke-balls. Nature wrought darkness; man might therefore copy her example and secure it, though by artificial means. "Balls which cast forth so great a smoak that they blind whomsoever they come near" were advocated by Simienowicz and by the author of "The Compleat Gunner" as "the most lawful way that one may follow, because it shews its original from natural things, and we may believe that this is alwayes sufficient justice, so that the wars where such things are practised be not unjustly enterprised." With blissful oblivion of this moral the latter writer proceeds next to discourse on "Stink Balls," which "are made to annoy the Enemy by their stinking vapours and fumes disagreeable to Nature." He further gives directions for the manufacture of poisoned bullets.

Whatever the anonymous writer of 1672 may have thought, the consensus of opinion has always been against such practices. Simienowicz, who wrote in 1649, though he considered *balles à fumée et à puanteur* were a means of *guerre loyal*, was not of the same way of thinking with regard to poisoned bullets and the fogs, storms, and thick mists made use of by Cossacks and Tartars in 1644 at Ochmatow. In 1675 we find *les Alliés conviennent, avec les Français, qu'il ne sera pas fait usage de balles empoisonnées*. Further arrangements were usual concerning the

type of bullet that might be used, tin being especially forbidden as material. In an Italian treaty of 1690 it is expressly noted that bullets are not to be made of any metal but lead, and this stipulation occurs again and again in subsequent treaties and cartels, with—as a rule—the additional prohibition of the use of “ramm’d bullets”—a literal, or rather phonetic, translation of *Palle ramate* or *Balles ramées*, in other words bar-shot—which the Dutch used in 1672 at the siege of Maestricht. The cartel or treaty between Leopold, Emperor of Rome, and Louis XIV., in 1692, expressly states nothing is to be employed which is forbidden among Christians as unlawful to be used against the life of man or beast. Ten years later Louis bought the secret of Poli’s invention—*un feu dangereux*—in order to destroy it—*l’anéantir*—as contrary to the *droits des gens*. Putaneus, in his “Grundlehren der Artillerie,” forbade the use of poisoned bullets. However, Flemming in “Le Soldat allemand” declared, in 1726, that their employment was *une question de politique*. Wolff argued poison was permissible, though the mass of authority from the days of the ancients agreed with the Roman dictum, *Armis bella, non venenis, geri debere*, and Vattel naïvely summed up the arguments with the confession that “Besides, if you poison your arms, the enemy will follow your example. And thus, without any advantage to yourself on the decision of the quarrel, you will render the war more cruel and horrible.”

In his presidential address to the Folklore Society this year, Dr. Marett, speaking on savagery in war, put the pertinent question, does it pay? History at least has no hesitation in its reply. In the long run it does not. Ruthless barbarity makes for no durable success, else had the Assyrian wolf never been ousted from dominance in the fold of the nations. After every period of indiscriminate savagery come a set-back, a return to more moderate, to saner methods. In this connection another point emerges from the welter of world struggles: tyranny does not make power, but success may breed the tyrant; moreover,

tyranny and cruelty, like fear and cruelty, are never far apart. To give a national and an individual example: Rome, before her zenith was reached, when the Fecials were, as Vattel puts it, "the interpreters, the guardians, and in some sort the priests of the public faith," made war with a measure of restraint, with a regard for law and custom; but imperial Rome, drunk with the lust of power, drifted from her previous high standing, the international ideals she had herself once evolved: so, too, Henry V., fighting, whether professedly or no, to impose what he considered to be a superior civilisation—or, as Germany would say, *Kultur*—on a country that preferred its own, however inferior the standard, started with more humanitarian sentiments and projects than later he could find to be compatible with all his schemes of conquest. In August, 1415, before the seize of Harfleur, where "he plaied at tenys with his hard gonne stones," as a contemporary chronicler puts it, Henry issued a Proclamation the "Statutes and Ordenances . . . made at trefy and counseill of Maunt." These "Ordenances" very explicitly forbid desecration or robbery of "Holy Churche;" killing or making prisoners of women, unarmed priests, or children under fourteen; and include rules "For kepinge of the Countre . . . that no man be so hardey to robe or pille therein after that the peas is proclamyd;" "For Prysoners"—several regulations—; "For women that lie in Gesem;" and against waste of "Vitaill," or "Robinge of Marchantes comyng to the Market."

This last phrase takes one back to prehistoric warfare, when market and trade route appear to have been at least partially exempt from the turmoil of intertribal strife, and recognised as necessarily common ground, a neutrality that conferred mutual benefit on all combatants. How and when questions of contraband arose it is difficult to decide, but they are no development of modern days. The actual word has been traced first to an Italian charter of 1445; in England it makes its initial appearance in the treaty of Southampton in 1625. The subject

is a complex one, and not without its sentimental confusion of issues to-day. It has never been held contrary to civilised practice for a General to prevent by every means in his power the conveyance of provisions to a besieged city. Starvation is a recognised means of forcing a surrender. That non-combatants, women, children, sick and aged, in the invested locality will suffer with the combatant garrison is one of the tragic outcomes of war. It may be of definite value in securing capitulation. At the siege of Wessel, in 1671, when, as the Prince de Condé relates, the women of the town, terrified at the progress of the siege works, demanded leave to quit, they were told, "He could not think of depriving his triumph of its greatest ornament," a compliment the sufferers could hardly have been expected to appreciate. "His calculation," the record continues, "was just; those very women prevailed on the governor to surrender at the end of three days." Exactly a hundred years later, during the siege of Cracow, the commandant of the castle offered to give up one hundred civilian prisoners, and asked permission for the clergy and their attendants to leave. Count Suvorov refused, "in order to increase the distress of the garrison by so many useless mouths." The "Green Curve" has long had recognition in siege warfare. But when the same principle is applied on a larger scale there are sentiment-mongers to-day who will make outcry against sufferings wrought by a state of blockade, which is simply a comprehensive naval siege, and who will demand that food at least be permitted to reach the non-combatant inhabitants of the enemy country. Setting aside the difficulty of differentiation between combatant and non-combatant, and the impossibility of preventing such supplies, once admitted, reaching both alike, or even combatants to the exclusion of non-combatants in extreme cases, why should, as a matter of abstract justice, the exclusion be permitted in the first case and not in the second? From the days when Jews and Romans made treaty, in Maccabean times, provisions have been included with arms, ships, and money, as contraband of war.

Indeed, prohibitions in war, be they of methods, munitions, merchandise or manners, are no new thing; nor are they peculiar to the nations that arrogate to themselves the title of "civilised." Even barbarian warfare has its taboos, its ceremonies. Among the Malays the Battaks announce war by a cartel; the Ilongotes of North America send arrows or sprinkle the road with blood. In the lowest grades of humanity there are restrictions—things that, in popular phrase, no decent fellow would do. There have been, and there must always be, rules for the Great Game, else would confusion ensue. Discipline, after all, is but law in another form. But in the matter of rules mankind has "sought out many inventions." A possibly less self-deceiving age dubbed them "Articles of War;" chivalry and Christianity added to the etiquette, and brought further measure of humanity into the business; with Grotius we get a definite attempt to range them—customs, usages, etiquette, and the dictates of humanity—as recognised and recognisable law, not for one belligerent, as Henry's "Ordinances," but for all.

The etiquette of mediæval warfare was no mere empty ceremony. Heralds in the days of chivalry enquired and proclaimed the terms of combat. The last herald to announce war was sent to the Danes in 1657. Subsequently the method changed, and hostile powers prearranged by treaty or cartel those matters which heretofore had been the province of the herald—such as the ransom, treatment, or exchange of prisoners, and later the treatment of wounded. From these cartels much may be gleaned. For instance, the treaty between England and Spain in 1630 ruled that prisoners should not be sent to the galleys—proof enough of their previous hard fate. But legislation on behalf of these unfortunates of war is of earlier origin. Haroun al Raschid, hero of so many a tale that it is almost startling to find him a real historical personage, in the year 797 made treaty with the Empress Irene, and eight years after with the Emperor Nicephorus, for the exchange and ransom of prisoners. They cried quits, or sold the balance to the adversary instead of dis-

posing of the prisoners through the ordinary channels of the slave mart. Slavery was the portion of war captives for century after century. They were spoils of war. Gradually life and freedom became a definite matter of purchase; the captive was, actually, merchandise; he represented potential wealth to his captor. By slow degrees the system of ransom was established not as an occasional favour on the part of a good-natured or broad-minded conqueror, but as a custom of war. Even as late as the Thirty Years' War exchange was looked upon as "robbery;" and if a prisoner was of sufficiently high rank he might be purchased—as a speculation, or for purpose of reprisal, or other weighty matter of state—from the individual captor by the latter's superiors; for example, the Emperor paid £4,000 to Verdugo, "the party seizing . . . in order to get the young Prince of Anhalt into his own hands." But by the middle of the seventeenth century more liberal views were permeating the nations. By arrangements made at Dunkirk, in 1646, the prisoners on both sides were to be returned. Nor was this the only improvement. Henry V.'s exemption of women, priests, and children, grew to include the medical staff and other non-combatants. The cartel of 1673, between France and the Netherlands, specifically notes they shall be freed *sans rançon*. Two years later the same countries agreed that the prisoners were to receive certain moneys *outré le pain de munition*; and it was forbidden to deprive them of their clothes. The same year—at Strasburg—France and Germany settled that neither sick, wounded, nor medical staff were to be *dépouillés*. More detailed rules for the treatment of prisoners were laid down in the cartels of 1690 and 1702. This last, the "New Cartel Between the Imperialists, English, Dutch, etc., of the one part; and the Spaniards and French, on the Other part," not only gives the elaborate tables of exchange common to all cartels at the period—the prices varied from 50,000 *livres* for an English Commander-in-Chief to forty for *un gentilhomme du canon*, and nine for a soldier or *pontonier*—but includes explicit directions as to who

are exempt from ransom, how difficulties about pay are to be settled, what money is required during imprisonment for subsistence, how officers are to be treated, parole, reciprocal payment of expenditures by all belligerents, accounts, record of prisoners taken and exchanged, return of prisoners, regulations concerning small parties taken in arms—to prevent desertion and guerilla tactics—the care of wounded and sick, the lodgment of prisoners, passports, notification of capture; and, further, forbids the enlistment of prisoners and the use of prohibited munitions. Forty-one years later, after Dettingen, definite arrangements were made “that the hospitals on both sides should be considered as sanctuaries.”

An interesting point in connection with capitulations and the exchange of prisoners is to be found in accounts of the siege of Cracov. When Suvorov captured the castle, part of the garrison consisted of French soldiers. But, at the time, there was officially no war between the powers of France and Russia; therefore it was ruled “no exchange of prisoners can take place,” and according to the articles of capitulation the Frenchmen had to “surrender themselves only as prisoners, but not as prisoners of war.” Another thing to note is that in nearly every case of cartel or treaty it is agreed that prisoners should not be retained for more than a fortnight. At the end of the fourteen days they must be released, even if the total sum owing as ransom were not paid. The twentieth century has not entirely dismissed the notion of sale and purchase. “We prisoners are their assets, their gold reserve, their pawns and chips in the game,” wailed the anonymous author of “As the Hague Ordains.” “We are as good for exchange and quotations as bonds or gold. Oh! God! to think I—I myself—my own poor body has its daily market value in this stock-gamble of nations!” The personal gain has been transferred entirely from the individual victor to the State; for war, once an individual matter, became a State affair. The tendency of this at first was to rule out the non-combatants in operations of war more fully even than previously

had been the case; and to judge by the cleaner records of the eighteenth century this resulted in humaner warfare. Fighting was the concern only of those forces of the State—voluntary, hired, or impressed for service—which made war their own particular business—the professionals. On paper it was an excellent development; and the civilian immune from war's alarms, except vicariously, had the privilege of criticising in safety—tempered only by the one serious drawback of having eventually to foot the bill in gold that the soldier had paid in blood. But it cuts both ways. *La guerre n'est pas déclarée par ceux qui la font*. To-day such immunity is threatened. We are learning what not only the discipline and mobilisation of an army, but also the discipline and mobilisation of a people mean. As von der Goltz foresaw, as Alphonse Seche in "*Les Guerres d'Enfer*" demonstrates, war is ceasing to be a matter of professional combat and promises to be more and more not only an engagement between two armies, but the exodus of two peoples.

Space forbids further inquiry as to even those war crimes already referred to, far less entry into discussion about others, or the examination of incidents during the campaigns of the last century as a method of comparison with those done during the past year and in the doing to-day. Of individual war crimes instances can be gathered from all wars; but to find a belligerent that, not of misadventure, not in the passionate on-rush of strife, but openly with organiser and deliberate intention, sets aside all the standards of "civilised" warfare, the pages of history must be turned for such dark periods as the wars of the Assyrians of old, the Thirty Years War, or the chaotic strifes that periodically have rent those portions of Europe and Asia we term the Near East. The words of Gustavus Adolphus, who "ever drew a line of partition between the man of service and the ruffian," are as grave an indictment of Teutonic methods, then and now, as could well be penned. He spoke of "the ravages, extortions, and cruelties lately committed . . . and that . . . persons of rank, birth, education, and competent incomes

have been guilty." In the same impassioned speech to the German officers in his army he declared, "this diabolical practice of ravaging and destroying lays a dead weight." On a previous occasion he had begged, "Let us not imitate our ancestors of confusion, the Goths and Vandals, who, by destroying everything that belonged to the fine arts, have delivered down to posterity their barbarity and want of taste, as a sort of proverb and byword of contempt."

Kultur!

"Do men gather grapes of thorns, or figs of thistles?" Germany is true to her record.

"Nothing," writes Colonel Edmonds, "is more demoralising to our troops or more subversive of discipline than plundering." But, as Bentwich points out, "the theoretical inviolability of private property on land is circumvented on the Continent by a liberal interpretation of the necessities of war, and the German staff-rules actually recognise and give legal validity to a number of harsh practices under the title of *Kriegsmanner*, which temper, or rather whittle away, the laws of nations (*Kriegsraison*) on the ground that military necessity brooks no restraint." The plea of military exigencies, military necessities, is no new one on the lips of German casuists. They have always had sophistries to controvert the restrictive tendencies of accepted mitigations of war. They have gone further and urged success as plausible excuse for outraging humane conventions. To what lengths the doctrine has been carried von Bethman-Hollweg displayed when he made his callous and cynical statement in the Reichstag on August 4 last year: "We are now in a state of necessity, and necessity knows no law." The justification of necessity once admitted, law does end—for who is to define "necessity"? By the standards of a Bethman-Hollweg the offender decides. Which is absurd.

What is to be the conclusion of the matter? Are we to admit the apostles of *Kultur* correct in upholding the doctrine of might as right? Is physical force not only dominant but the deter-

minant factor in human affairs? When nations seethe in the melting-pot of war the futility of paper contracts has received ghastly demonstration. But codes of law have their value for neutral nations in that they supply some standard whereby rights of trade and transit may be in a measure estimated, and the danger that threatens themselves, their goods, or their vessels—and it has proved such danger is increasing, not diminishing—may be adjudged, and a portion of the losses inevitable in a state of war may be avoided. One of the many suggestions that have been advanced is that an International Law Court might be established at the Hague as a central administrative Prize Court. In such a war as the one we are now engaged upon this would be of no greater use than individual Courts set up by the combatants. Belligerents as the parties interested, by juridical principle, could not sit on it. Neutrals would practically, if not theoretically, be in like case where decisions as to neutral rights were concerned. What remains? The Court might lay down a thousand laws as to contraband and neutral trading, but how would it enforce them? All the weightiest tomes and wordiest diatribes are of no avail when one is up against elemental passion and raw fact. War sweeps away the trappings of peace-made law, and only the shell and the bayonet can gainsay its verdicts. "The litigant," said Professor Cramb, "appeals to something higher than himself, while no free State sees anything higher than itself." It needs no lawyers' arguments to prove that "the entire world has, properly, a right to consider whether an alleged grievance is a justifiable and sufficient cause for making war. It has, further, a right to intervene when the alleged cause is unfounded." Legal splitting of hairs is a weird folly to the plain soldier. Who denies the right? And of what matter if they do? What value lies in moral sanction without the will for forceful suasion to compel the acceptance of a judgment? Once the will to intervene exists the act swiftly follows—but it usually takes more than an abstract theory of right or wrong to rush a nation into the adventure of war.

It would seem, then, that might is indisputably the dominant factor. But this does not make it the determinant factor. Superficially it may appear so, but there are deeper issues and influences to be considered; for, after all, physical force itself is controlled by the greater values of spiritual and idealistic forces—the supremacy of the mind. Here lies the ultimate triumph. So that Ethics in the final assize must tell for more than Law, because Law becomes the servant of Ethics. Conformity to the rules of warfare is a test of national ideals. The British record is a high one because the liberty-loving Briton is first of all a sportsman. His sense of fair play, and appreciation of any opponent who puts up a good clean fight, make him—from General to last-joined recruit—a gentleman on the battle-field. Of his own initiative he would, as a matter of course, avoid committing the majority of war crimes, whether International Law condemned them or not. But he expects reciprocal treatment, and knows the value of reprisal if forced thereunto.

During the Civil War in America the Federal States professed to adopt Lieber's "International Law" as the basis of action. But surely the lawyers' apotheosis was reached when Japan, newly admitted into the comity of nations, attached professors and diplomats—authorities on International Jurisprudence—to the Headquarters Staff in the Field, to advise the General Officer Commanding as to the legality of any action! Yet it was *Bushido*, not knowledge of forms and ceremonies, that secured the victory for the island empire. And that idealism which inspired her one-time enemy is alive in Russia's struggle to-day. So her devastated lands, and stricken Belgium, the trampled fields and ruined cities of northern France, our own slaughtered women and children at seaside resorts, in country villages, or on sunken vessels, our wounded, our mutilated dead and murdered prisoners, stand for no mere wastage on the mid-dens of war, but make for that spiritual influence in the world's progress that on one far day will usher in—the Golden Age.—*United Empire Journal*.

COMMERCIAL IMPOSSIBILITY.

In *Associated Portland Cement Manufacturers (1900) Ltd. v. W. Cory & Son, Ltd.*, 14th May, 1915, Rowlett, J., held that a commercial contract, in spite of the *Coronation* cases, was not dissolved by its becoming commercially impossible on account of the war. His Lordship took the view that the rule in *Taylor v. Caldwell* still applies only where a specific thing, the foundation of the contract, has ceased to exist. The disturbance of the "return coal trade" from Scotland, on whose continuance the defendants relied when making their contract to carry cement to Rosyth, did not relieve them from it. The case puts a useful check on the dangerous uncertainty which the *Coronation* cases created. Nor, it was held, did the interference with traffic amount to a "restraint of princes," or to a Government interference under the Defence of the Realm Act (Second Amending Act), 1915, s. 1(2). Ridley, J., gave a somewhat different decision in *Berthond v. Schweder & Co.*, 29th April, 1915.—*Law Magazine*.

KILLING PRISONERS.

The statement, if correct, in a communiqué received from the Russian headquarters, published in Petrograd on the 20th July, and published in the British Press with the permission of the Censor, that, according to information given by Austrian prisoners of war, the Germans shot 5,000 Russian prisoners at Rawa Russka, eclipses in its horror the atrocities of the French Revolution. When the Convention in 1794 had decreed that no quarter should be given to the English, Hanoverians, and Spaniards, the French soldiers nevertheless took prisoners from a sense of military honour, and excused it to the Government on the ground that the men were *deserters*. The infamous decree was soon revoked without even a threat of retaliation. The cases in which prisoners of war may be slain, however exceptionable the circumstances may be, are, in the words of Burke, "cases at which morality is perplexed and reason staggered." The savage

practice of killing enemies, to which Henry V. resorted after Agincourt, by putting to death the combatants in what he deemed self-defence, although he protected the peaceful population, was likewise the practice of the Chevalier Bayard, who otherwise conformed to the principles of humanity in warfare. While the killing of captives was an old Roman custom employed to inspire dread, it was not universal among the Greeks, whose later practice was to regard them as slaves. The sparing of the lives of prisoners had, as we have seen, become firmly established in civilized warfare at the time of the French Revolution, although, no doubt, Napoleon in 1799 shot three or four thousand Turks captured at Jaffa, who would not respect parole, because he could not feed or escort them. On the other hand, Charles XII. after Narva, released his captives under similar circumstances.—*Law Times*.

RIGHT OF THE CROWN TO REQUISITION LAND.

An aviation ground was taken by the Crown. Mr. Justice Avory held that he had come to the conclusion that the King, by virtue of his war prerogative, was entitled, in the circumstances, to take possession of the land. In addition to that, the regulations under the Defence of the Realm Act conferred on the competent naval and military authorities during the continuance of the war an absolute and unconditional power to take possession of land and buildings, and to do any other act for the public safety and the security of the realm, even though that act interfered with private rights to property. The suppliants had failed to establish any right in law to compensation. There must be judgment for the Crown. His Lordship thought, however, that the suppliants were entitled, under the Royal Commission of Inquiry of 31st March last, to apply for compensation for loss or damage suffered through interference with their property.—*Solicitors' Journal*.

Reports and Notes of Cases.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Lord Chancellor Haldane, Lord Dunedin,
Lord Atkinson, Sir Geo. Farwell, and
Mr. Ameer Ali.] [113 L.T. Rep. 55.

BALMUKAND AND OTHERS v. THE KING-EMPEROR.

Judicial Committee of the Privy Council—Practice—Petition for leave to appeal against conviction—Sentence of death—Stay of execution of sentence—Matter for executive and not for committee.

Upon the hearing of a petition to the Judicial Committee for leave to appeal from a death sentence, and for the postponement of the execution of the sentence pending the hearing of the appeal:

Held, that, with regard to staying execution of sentence, the Board were unable to interfere, and, therefore, thought it not right to express any opinion as to whether, on the facts stated, leave to appeal should be granted.

The Board was not a Court of Criminal Appeal, and the question whether His Majesty should be advised to exercise his prerogative of pardon was a matter for the Executive Government and was outside the jurisdiction of the Board.

A. M. Dunne, for the Crown. Sir R. Finlay and B. Dubé, for petitioners.

Dominion of Canada.

SUPREME COURT.

B.C.] KOOP v. SMITH. [May 18.

Bill of sale—Transfer in fraud of creditors—Assignment between near relatives—Suspicious circumstances—Corroborative evidence—Bona fides—Practice.

Where a bill of sale made between near relatives is impeached as being in fraud of creditors and the circumstances attending

its execution are such as to arouse suspicion the Court should, as a rule of prudence, exact corroborative evidence in support of the reality of the consideration and the *bona fides* of the transaction. Judgment appealed from, (7 West. W.R. 416,) reversed.

Appeal allowed with costs.

Laflaur, K.C., for appellant. *Orde*, K.C., for respondent.

Exch.]

TURGEON v. THE KING.

[June 24.

Government railway regulations—Operation of trains—Negligent signalling—Fault of fellow servant—Common fault—Boarding moving train—Disobedience of employee—Voluntary exposure to danger—Cause of injury.

By a regulation of the Intercolonial Railway, no person is allowed to get aboard cars while trains are in motion. Without ascertaining that all his train-crew were aboard, the conductor signalled the engineman to start his train from a station where it had stopped to discharge freight. One of the crew, who had been assisting in unloading, then attempted to board the moving train and, in doing so, he was injured.

Held, that the injury sustained by the employee resulted solely from his infraction of the regulation which he was obliged to obey and not from the fault of a fellow servant; that by disobedience to the regulation he had voluntarily exposed himself to danger from the moving train; that the negligence of the conductor in giving the signal to start the train was not an act for which the Government of Canada could be held responsible, and that its relation to the accident was too remote to be regarded as the cause of the injury.

Judgment appealed from, affirmed.

Appeal dismissed with costs.

Lane, K.C., for appellant. *P. J. Jolicoeur*, for respondent.

Exch.]

[June 24.

THE QUEBEC, JACQUES-CARTIER ELECTRIC COMPANY v. THE KING. THE FRONTENAC GAS COMPANY v. THE KING.

Expropriation Act, R.S.C., 1906, c. 143, ss. 8, 23, 31—Abandonment of proceedings—Compensation—Allowance of interest—Construction of statute—Practice—Taxation of costs—Solicitor and client—Reimbursement of expenses—Interpretation of formal judgment—Reference to opinion of judge.

While the owners still continued in possession of lands in respect of which expropriation proceedings had been commenced

under the "Expropriation Act," R.S.C., 1906, chap. 143, and before the indemnity to be paid had been ascertained, the proceedings were abandoned, no special damages having been sustained.

Held, that in assessing the amount to be paid as compensation to the owners, under the provisions of the fourth sub-section of section 23 of the "Expropriation Act," there could be no allowance of interest either upon the estimated value of the lands or upon the amount tendered therefor by the Government.

The trial Judge, by his written opinion, held that the owners were entitled to be fully indemnified for their costs as between solicitor and client and for all legitimate and reasonable charges and disbursements made in consequence of the proceedings which had been taken. The formal judgment provided merely that costs should be taxed as between solicitor and client.

Per DAVIES, IDINGTON, ANGLIN and BRODEUR, JJ.:—In the taxation of costs, the registrar should follow the directions given in the Judge's opinion to interpret the formal judgment as framed. DUFF, J., *contra*.

Per DUFF, J.:—The registrar, in taxing costs, is required by law to follow the terms of the formal judgment and it is not open to him to correct it in order to make it accord with his interpretation of the opinion judgment.

Appeals dismissed with costs.

E. A. D. Morgan, for appellants. *Newcombe*, K.C., for respondent.

Que.]

[June 24.

GUARDIAN ASSURANCE CO. *v.* TOWN OF CHICOUTIMI.

Fire insurance—General conflagration—Acts of municipal officials—Demolition of buildings—Statutory authority—R.S.Q., 1888, art. 4426—Indemnity—Subrogation—Tort—Transfer of rights to municipality—Liability of insurer.

Article 4426, R.S.Q., 1888, empowers town corporations, subject to indemnity to the owners, to cause the demolition of buildings in order to arrest the progress of fires, in the absence of a by-law to such effect power is given to the mayor to order the necessary demolition. In the Town of Chicoutimi, no such by-law having been enacted, the mayor gave orders for the demolition of a building for the purpose of arresting the progress of a general conflagration and, in carrying out his directions, an adjacent building was destroyed which was insured by respondents for \$4,700. The municipality settled with the owner

by paying her \$5,500 as full indemnity for all damages sustained, and obtained a transfer of her rights under her policy of insurance with the respondents. In an action on the policy so transferred:

Held, (Duff, J., dissenting,) that, as the destruction of the building insured was occasioned by an act justified by statutory authority and full indemnity had been paid, the municipality was entitled to subrogation in the rights of the owner and to maintain the action against the insurance company for reimbursement to the extent of the amount of the insurance upon the property.

Per DUFF, J., dissenting:—Although the destruction of the building insured was occasioned by an act justified at common law, the rights of the municipal corporation were determined by the principle laid down in *The City of Quebec v. Mahoney*, Q.R. 10, K.B. 378, and the claim for reimbursement to the extent of the amount for which the property was insured could not be maintained. *Quebec Fire Insurance Co. v. St. Louis*, 7 Moo. P.C. 286, applied.

Appeal dismissed with costs.

Atwater, K.C., for the appellants. *Belcourt*, K.C., for the respondent.

Ont.]

COFFIN v. GILLIES.

[June 24.

Contract—Construction—Sale of foxes—Mixed breeds.

By contract in writing G. agreed to sell to C., who agreed to buy, two black foxes "to be the offspring of certain foxes purchased by the vendor from Charles Dalton and W. R. Oulton in the year 1911."

Held, (Davies and Duff, JJ., dissenting,) that the proper construction of the contract was that the two foxes to be sold must have both Dalton and Oulton parentage, and G. could not be compelled to deliver a pair bred from the Dalton strain only.

Appeal dismissed with costs.

D. C. Ross, for the appellant. *W. M. Douglas*, K.C., and *J. E. Thompson*, for the respondent.

Ont.]

HAMILTON STREET RAILWAY CO. v. WEIR. [June 24.

Negligence—Obstruction of highway—Street railway—Trolley poles between tracks—Statutory authority—Protection by light.

The Act incorporating the Hamilton Street Railway Co. authorized the city council to enter into an arrangement with the

company for the construction and location of the railway. A by-law passed by the council directed that the poles for holding wires should, on part of a certain street, be placed between the tracks, which was done under the supervision of the city engineer.

Held, reversing the judgment appealed against (32 Ont. L.R. 578), that the location of the poles was authorized by the Legislature, and did not constitute an obstruction of the highway amounting to a nuisance; the company was therefore not liable for injury resulting from an automobile, while driven at night, coming in contact with the pole.

Held, also, that as on the city council was cast the duty of regulating the operation of the railway in respect to traffic and travelling on the street and it had made no regulation as to lighting the pole, the company was under no obligation to do so.

Appeal allowed with costs.

D. L. McCarthy, K.C., and *A. H. Gibson*, for appellants.
Howitt, for respondents.

Book Reviews.

Bullen & Leak's Precedents of Pleadings in Actions in the King's Bench Division of the High Court of Justice, with notes. Seyenth edition. By *W. BLAKE ODGERS*, M.A., LL.D., K.C., and *WALTER BLAKE ODGERS*, M.A. London: Stevens & Sons, Limited, 119-121 Chancery Lane; Sweet & Maxwell, Limited, 3 Chancery Lane. Toronto: Canada Law Book Company. 1915.

The first edition of this standard work appeared in 1860. It immediately took the first place in works on pleadings, a subject which was much more intricate, and when pleadings were much more elaborate, than they are now. Let it not be supposed, however, that there is no need for books on pleadings. A number of new precedents have been added to the work since the 6th edition, which appeared in October, 1905, and which is now out of print.

The editor in presenting these precedents to the profession reminds those who may use them that it is no longer possible for a pleader merely to copy all forms applicable to actions of the class to which his case belongs, as was often sufficient under the old system of pleading. There may be also some of the younger members of our profession who need to be reminded that under the present system all material facts have to be stated instead of

as formerly the legal result of those facts; and all necessary details must be set out in the body of the pleading. It is therefore necessary in using these forms to adapt or alter them to suit the facts of each particular case.

This standard work now consists of 1044 pages, concluding with a full analytical and topical index.

War Notes.

LAWYERS AND THEIR DUTY.

We fear that there may be some of us who need to get back to the spirit that animated the ranks of our profession in the days when England fought for her existence, more than a hundred years ago, as recorded in Lord Cockburn's "Memorials of his own time," already referred to in these columns (ante page 119). We in this country can well follow the example of such men as Lord Cockburn, Lord Brougham, the Lord Justice Clerk (Charles Hope), Walter Scott, Francis Horner, Dr. Gregory, Jeffrey and others known to fame in Scotland, as well as many more in England and Ireland who devotedly spent hours every day in drilling and preparation for active service.

Such names as those of our own great and good Chief Justice Sir John Beverly Robinson, of U.E. Loyalist stock, and that grand old Scotsman Archibald MacLean, Chief Justice of the old Court of Common Pleas, and others of that time who fought under the gallant Brock in the days of Canada's extremity, will never be forgotten.

Already even in this war we can claim that something has been done by Canadian lawyers. We are glad to know that prominent positions in the Overseas Contingents and in our volunteer regiments are filled by members of the profession. Amongst these the most prominent is the name of Brigadier-General M. S. Mercer, of Toronto, who is looked upon as one of the best general officers at present on active service, whether from England or elsewhere. Other members of the profession in the same rank may be mentioned, such as Brigadiers-General W. E. Hodgins and Henry Smith. Col. W. A. Logie, of Hamilton, commands the Second Division and is one of the most prominent and useful men connected with Canada's army; Lieut.-Col. S. C. Mewburn, Assistant-Adjutant General, must also be named. There are others of the profession throughout the Dominion

who are also hard at work in connection with military service of various kinds; we cannot refer to all, but we may mention that the three crack Toronto regiments, the Queen's Own, the 48th Highlanders and the 10th Royal Grenadiers, have lawyers as commanding officers. The writer would add that on a recent occasion whilst visiting the camp at Niagara, where some 13,000 men were under canvas, he was a guest at the officers' mess of one of the Overseas Battalions, and was pleased to see that more than a fourth of those present were of the same profession as himself: a retired Law Clerk of the House of Commons, the son of a deceased Chief Justice of Ontario, two sons of a Justice of its Appellate Court, the son of an ex-Minister of Justice, two sons of a Provincial Premier (also a lawyer), a member of a large legal firm, the son of one of the leaders of our Bar, and two law students.

But, whilst this is so, there has not been amongst the student class the enthusiasm that one might have expected. Some knowledge of the law is naturally a necessity for a law student, but, at present, a familiarity with military matters and a knowledge of drill are very much more important. Men are being judged now, and will be for many years to come, by the stand they take in this time of our Empire's need. Now that the legal mill is grinding again and students have returned to their studies we may surely expect to see a large number of them offering for that which will redound more to their credit even than a high standing in their classes. Their future patrons and clients will remember the former rather than the latter.

Letters from the front in these strenuous days vividly reveal the character and motives of men. May we quote a sentence from one of these, not written for publication. It is from a lawyer of ample means who left a luxurious home and a charming home circle to serve his country. He says: "Of course, I am not (speaking, of course, comparatively) happy here, but I would be perfectly miserable if I were not here." This breathes the true British spirit of Nelson's message, "England expects that every man this day will do his duty"; the spirit that makes our Empire unconquered and unconquerable.

Alfred Noyes in his great poem "Drake" sings thus:—

"Mother and sweetheart, England! . . .
 If my poor song
 Now spread too wide a sail, forgive thy son
 And lover, for thy love was ever wont

To lift men up in pride above themselves
To do great deeds which of themselves alone
They could not; thou hast led the unfaltering feet
Of even thy meanest heroes down to death,
Lifted poor knights to many a great empire,
Taught them high thoughts, and though they kept their souls
Lowly as little children, bidden them lift
Eyes unappalled by all the myriads stars
That wheel around the great white throne of God."

And let us also remember the words this same poet (who ought to be our Poet Laureate in these days), puts in the mouth of England's great Captain:—

"Not unto us,"
Cried Drake, not unto us—but unto Him
Who made the sea belongs our England now.
Pray God that heart and mind and soul we prove
Worthy among the nations of this hour."

THE WAY TO VICTORY.

In these days of intense nervous strain—increasingly so as the war clouds grow darker and the recent news from the Balkans and the East reveal fresh perils and perplexities confronting our armies in the East, overshadowing those in the Western area—and as we realise the need of increased supplies of men, money and material; of sacrifices of home comforts to supply the pressing wants of our men at the front and of rigid economy in view of reduced incomes and increased burdens; and of the sadness forced upon us by the news coming from day to day of loved ones "killed, wounded and missing," and all that these dread words imply, we are irresistibly led to the thought of some power greater than ourselves or the valour of our soldiers to shew us the way to victory and so put an end to the strife. This result of the war is becoming so apparent and so wide spread as to demand recognition even in a journal devoted specially to the interests and information of one class of the community.

The subject is incidentally touched upon in our article: "Is Christianity a part of the law? (ante p. 385). But instead of giving any views of our own we prefer to quote from such a man as the Bishop of London, and from the most representative of all British newspapers, the *London Times*. The former, in his great address at St. Paul's Cathedral in August last, alluded to

the celebrated cartoon in *Punch* where a dark figure (the Kaiser) sneeringly says to the King of the Belgians: "So you have lost everything," to which the King answered back: "But not my soul." The Bishop after referring to the soul of each of the allied nations said:—

"The Church has come out to-day to give a message to the soul of our nation. Have we got a soul? Who that knows the history of the English people can doubt it? It is a soul which gets overlaid, like the soul of other nations, with love of material comfort, with arrogance, and with wordliness; but the children would not be springing from all over the world to the mother's side if the mother had no soul, if there had been no love for freedom, no belief in honour, no care for the weak, no contempt for the merely strong; then there would have been no glad loyalty from thousands and tens of thousands who have rallied round her flag. . . . But, if we are to rise to our vocation, the first essential thing is that as a nation, not as a few groups of pious individuals, but as a nation, we should turn to God. The only power which can save Europe to-day is a nation which, while it fights and works and serves and saves without stint, is also a nation on its knees. . . . But to pray with effect we must pray with a good conscience, and that is the real significance of the Church's call to repentance. Repentance is not a weak whining on our knees to God because we are in a difficulty; it is a noble laying aside of all that makes us unworthy of working with the Great Friend."

In its leading article the next day the *Times* says:—

"The Church of England, it is commonly and not unjustly said, has been slow to rise to the great opportunities presented by the war. But we believe that it succeeded yesterday in expressing the mind of the nation in the intercession services that were held in London, and especially in the chief of them that was held on the steps of St. Paul's. And the mind of the nation, as it was then so justly and movingly expressed, asked that we might be made worthy of victory, so that victory, if it is given to us, may be good both for the world and for ourselves. We knew before the war that we had national faults, but we made no national effort to mend them; and when the war began we thought that the goodness of our cause would mend them, and that we should press on to a righteous victory in one happy and united onset. That has not happened, as it could not happen. . . . It is conviction of sin, not conviction of danger, that must

change us if we are to be changed. Conviction of danger alone will only make us upbraid each other; conviction of sin will set us asking plain questions of ourselves. . . . That was the spirit expressed in the prayers and in the words of the Bishop of London, and it was, we cannot doubt, the spirit of all troops ranged before him and of the silent crowd stretching far down Ludgate-hill."

This awful war obtrudes into all the activities of life, theological and religious as well as others. A Church Synod the other day debated whether or not the second verse of "God Save the King" was or was not to be canonical. To the surprise of most people it was ordered to be expunged. Those in favour of the motion probably thought that the word "confound" in "Confound their politics" was a "swear word," not knowing that it was simply an old fashioned way of expressing a prayer to bring confusion to the unrighteous counsels of a nation inspired by satanic hatred of a peace loving people. Fortunately the House of Bishops saved the situation and the verse was very properly retained. Again, a well known and highly esteemed theological institution ignorant of the wiles of the same evil spirit conferred its highest degree upon a pro-German, but has ever since been seeking a precedent to revoke the honour bestowed upon such an unworthy recipient. Perhaps the simplest plan would be to revoke it without a precedent. The loyal incumbent of the Church where this unsavoury divine was to lecture promptly shut the door in his face, and he retired, a sadder and a wiser man, to the German colony in Chicago he came from, and where, doubtless, this contemptible specimen of humanity has full liberty to insult and vilify the country that honoured him to his heart's content.

The following Proclamation has been issued by the Lieutenant-Governor of the Province of Ontario calling for contributions for the relief of our wounded soldiers and sailors at the various seats of the war. Doubtless it will be liberally responded to:—

WHEREAS the Most Honourable, the Marquis of Lansdowne, the President of the British Red Cross Society, has, on behalf of that organization and the Order of St. John, made an urgent appeal throughout the Empire for individual contributions for funds, to be collected on Thursday, the 21st day of October (Trafalgar Day), such money to be devoted entirely to relieving the sufferings of our wounded soldiers and sailors from home

and overseas at the various seats of war, from all parts of Our Dominions: AND WHEREAS Our Province of Ontario is one of the richest provinces in the Overseas Dominions of the Empire and its people are determined to do their share in the great struggle in which Our Empire is engaged:

WE, THEREFORE, APPEAL CONFIDENTLY to Our people of this Province to make such a contribution as will be worthy of the place you occupy in Our Empire, worthy of this Province and worthy of the great cause for which the appeal is made; AND, furthermore, we do hereby request that the Mayor of every town and city, and the Reeve of every municipality will confer immediately with the Patriotic and Red Cross Organizations in his community and with such other organizations and societies as he may see fit, and call a public meeting in each and every locality for the purpose of organizing a campaign for the collection of funds on the twenty-first day of this month with the object above mentioned;

WE, furthermore, urge upon all clergymen in the Province to bring this matter before their congregations at the first opportunity, and to impress upon them the necessity of prompt and liberal action; and We also appeal to Members of Parliament, Members of the Legislative Assembly, school teachers and the public generally to co-operate in this movement and assist in bringing the matter to the attention of every citizen.

The American Association for International Conciliation continues its foolish but harmless crusade in favour of peace at any price. One of its recent publications is "An Appeal to the Citizens of the Belligerent States." Of course, no one pays the slightest attention to these publications; but the conclusion of the one above referred to has such a comical side to it that we cannot refrain from referring to it. The writer states his belief that if "you make an appeal to the better side of man, then it will rise to meet you. Only fear can subdue a savage animal, but man, at least the cultured specimen of our day, requires something more—the establishment of justice. Give him that, and you will have made him in very deed harmless for good and all." One can scarcely imagine a more bitter dose of sympathy or advice to a tortured Belgian.

We suppose our Allies must for the present submit to the following activities of the Germans in Belgium in passing various legislative ordinances for the occupied territories; *e.g.*, the wearing or otherwise displaying of Belgian insignia in a provocative

manner, or the displaying of the insignia of other countries at war with Germany or her Allies, whether done in a provocative manner or not, is made an offence. Teachers and superintendents of schools are required to prohibit all anti-German demonstrations in the schools under their charge. Persons between the ages of 16 and 40 are prohibited from leaving Belgium, if they intend to enter the service of an enemy state or to take employment in a business manufacturing warlike stores for enemy countries.

We record with great regret the death, killed in action at the front, of Francis Mallock Gibson, student-at-law, son of Sir John Gibson, K.C., formerly Lieutenant-Governor of Ontario. Another son, Colin Gibson, has been wounded. We trust he may have a speedy and successful recovery. The family have our sincere sympathy.

It is very difficult to obtain information as to those of our number whose names appear in the casualty lists, we should therefore take it as a favour if our readers would inform us of any such that may come to their notice.

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

The amenity of privacy.—*Law Times*, June 5.

Guilty but insane.—*Ib.*

Parol variation of contracts within the Statute of Frauds.—*Ib.*, June 12.

Articles of Association—How far binding on the company.—*Ib.*, June 19.

Prisoner's statements.—*Ib.*

Permission to deviate from trusts.—*Ib.*, June 26.

Rights of minorities of shareholders in Companies.—*Ib.*, July 17.

Murder or manslaughter.—*Ib.*

Executors and compromisors.—*Ib.*, July 24.

Investment of infants' legacies.—*Ib.*

British land and aliens.—*Ib.*, August 21.

Detention of ship in enemy port.—*Ib.*

Variation in the methods of blockade.—*Ib.*

The public and the foreshore.—*Ib.*, September 4.

Novation of written contracts.—*Solicitors' Journal*, June 19.

Nonage and some of its incidents.—*Ib.*, June 26.

Remuneration of the law officers in England.—*Ib.*, July 24.

- Appropriation of land for military purposes.—*Ib.*, July 31.
 The inviolability in neutral waters.—*Ib.*, August 28.
 The limits of a trade union's privilege.—*Ib.*
 The effect of war on instalment deliveries.—*Law Magazine*,
 August.
 International law and the law of the land.—*Ib.*
 Submarine piracy.—*Ib.*
 Legislative strictures on Christian Science.—*Law Notes*, N.Y.,
 June.
 The photograph as evidence.—*Ib.*
 A check on Judicial supremacy.—*Ib.*, July.
 Confiscation of property in warfare.—*Ib.*, August.
 Defending a prisoner believed to be guilty.—*Ib.*, September.
 Blind trusts in conveyances.—*Central Law Journal*, July 16.
 Progress of Uniform State Laws.—*Ib.*, July 30.
 Requiring a street railway company to furnish seats for every
 passenger.—*Ib.*, Aug 13.
 The education of the lawyer in relation to public service.—
Ib., September 24.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Austin Levi Fraser, of Souris, Province of Prince Edward Island, Barrister-at-law, to be Judge of the County Court of Kings County, in the Province of Prince Edward Island, vice Stanislaus Blanchard, deceased. (September 25.)

Jean Baptiste Gustave Lamothe, of the City of Montreal, Province of Quebec, K.C., to be a Puisne Judge of the Superior Court in Province of Quebec, vice Mr. Justice Beaudin, deceased. (September 25.)

Hon. Arthur Meighen, B.A., K.C., Solicitor-General of Canada; to be a Member of the King's Privy Council for Canada. (Sept. 30.)

Hon. Louis Codierre, of the City of Montreal, Province of Quebec, a Member of the King's Privy Council for Canada, K.C., to be a Puisne Judge of the Superior Court in and for the Province of Quebec vice Hon. Mr. Justice Pelletier, a Member of the King's Privy Council for Canada, who has been appointed a Justice of the Court of King's Bench. (Oct. 6.)

Louis Theophile Marechal, of the City of Montreal, Province of Quebec, K.C., to be a Puisne Judge of the Superior Court for the Province of Quebec, vice Hon. Mr. Justice Tellier who has resigned the said office. (Oct. 6.)

Flotsam and Jetsam.

The devotion of a large part of the long vacation by the Lord Chancellor of Ireland to the visiting of lunatic asylums, to which reference has been made in these columns, may recall a good story told by Mr. Daniel O'Connell when speaking at a public meeting in 1843 in condemnation of the conduct of Sir Edward Sugden (Lord St. Leonards) as Lord Chancellor in the dismissal from the Commission of the Peace of magistrates, amongst whom was Mr. O'Connell himself, for attending meetings convened to petition for the repeal of the Union. "The Lord Chancellor," said Mr. O'Connell, "had made an arrangement with Sir Philip Crampton, the Surgeon-General, to visit without any previous intimation Dr. Duncan's lunatic asylum at Finglas, near Dublin. Some wag (supposed to be Mr. O'Connell himself) wrote word to the asylum that a patient would be sent them in a carriage that day, a smart little man, who thought himself one of the judges or some great person of that sort, and he was to be detained by them. The doctor was out when the Lord Chancellor arrived. He was very talkative, but the keepers humoured him and answered all his questions. He inquired if the Surgeon-General had come. The keeper replied, 'No, but he is expected immediately.' 'Then I shall inspect some of the rooms till he arrives.' 'Oh, sir,' said the man, 'we could not permit that at all.' 'Well, then, I will walk for a while in the garden,' said his Lordship. 'We cannot let you go there either,' said the keeper. 'What!' said he, 'don't you know I am the Lord Chancellor?' 'We have four more Chancellors here already,' was the reply. He got enraged, and they were thinking of a strait-waistcoat for him when luckily Sir Philip Crampton arrived. 'Has the Lord Chancellor come yet?' said he. The man burst out laughing and said: 'Yes, sir, we have him safe; but he is by far the most violent patient in the House.' I really believe the Lord Chancellor caught the fury of superseding magistrates while he was in Dr. Duncan's asylum, and it would be fortunate if all the rest of the Ministry were there with him": Fitzpatrick's Correspondence of Daniel O'Connell, ii., pp. 306-307.

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ATTACHMENT AND COMMITTAL.

Rule No. 545 of the Consolidated Rules of Practice of the Supreme Court of Ontario provides that, "a judgment requiring any person to do any act other than the payment of money, or to abstain from doing any thing, may be enforced by attachment or committal."

It was said by Chitty, J., in *Callow v. Young*, 56 L.T. 147, that "committal was the proper remedy for doing a prohibited act, and attachment was the proper remedy for neglecting to do some act ordered to be done." This distinction if it ever really existed, is now done away with by Rule 545. On what reason the alleged distinction was based was not stated by the learned Judge, and it is not apparent.

It must be admitted, however, that it is not very clear in what circumstances an attachment is now the proper remedy, and in what circumstances a committal should be sought.

A glance at the form of a writ of attachment and an order of committal may perhaps assist in leading to a proper conclusion.

Form No. 120 shews that a writ of attachment requires the sheriff to attach the person named "so as to have him before our Justices . . . then and there to answer to us as well touching a contempt which he, it is alleged, hath committed against us, as also such other matters as shall be then and there laid to his charge."*

The order of committal on the other hand directs that the party in contempt do stand committed to gaol for his contempt (*specifying it*).

*Compare this with the *ca. re* in a civil action: Tidd's Forms (6th ed.) 42.

It will be seen that while the latter proceeds on a definite adjudication of contempt: the writ of attachment is more in the nature of a summons to shew cause. The party is to be brought before the justices to answer his *alleged* contempt. Should he attempt to answer and fail to make out any defence, then, strictly speaking, an order of committal should be made.

It may be well asked how did these two proceedings come to be in a measure confounded with each other. We can only offer a conjecture. An attachment being issued against a party for contempt and he being in custody, if he desired to shew cause he would have to obtain, according to the ancient procedure, a *habeas corpus cum causa*,* and on the return of that writ apply for his discharge by shewing that he had not been guilty of the contempt charged. If, however, he had in fact no cause to shew, there would obviously be no object in incurring the expense of a *habeas corpus*, and he would remain in custody under the attachment as if there had been a formal adjudication made against him. In this way an attachment would come to have the same effect as a committal and the distinction between the two proceedings would be apt to be lost sight of.

Under the former procedure in Chancery, attachments were in some cases issuable on praecipe as of course. These were cases in which the contempt appeared by the records of the Court, as, for instance, where an affidavit was required to be filed, and no affidavit was in fact filed, or the alleged contempt appeared by affidavit filed. There the contempt was *primâ facie* made out and the writ issued as of course, without any formal adjudication. But in such a case it would be competent for the party attached to rebut the *primâ facie* case of contempt, and to shew if he could that he was in fact guiltless. The attachment would not be conclusive evidence of contempt any more than a *ca. re* would be evidence that the defendant was liable to the plaintiff as alleged. But in the case where a party in contempt was not liable to be attached in this summary way and a

*See Tidd's Forms (6th ed.) 130.

formal adjudication of his being in contempt was necessary, then it would appear that the proper proceeding was as it is now to apply to commit him, and on the return of the motion he would have an opportunity to make his defence and if he failed, then the order to commit would not be in the nature of a summons to shew cause, but a definite adjudication that he was in contempt, which would be irrebuttable, and the only remedy would be by way of appeal, if any.

The same line of reasoning would appear to be applicable in cases where it is sought to punish contempts by strangers to a cause as, for instance, for publications interfering with the course of justice, or other contempts committed outside the Court, the proper motion would appear to be to commit and not a motion for attachment—unless the application is for any reason made *ex parte*. Cases might arise where, if a notice of motion were served, the offending party would possibly elude justice and the Court might see fit on an *ex parte* application to grant an attachment, but an attachment would not, in such circumstances, be a conclusive adjudication, whereas an order for committal made on notice would be so.

Seeing, however, that a writ of attachment can no longer in any circumstances be issued without the leave of the Court; it seems to be open to question whether the writ should any longer be in its present form, No. 120, except only where it is issued *ex parte*. When issued after notice, it is issued as the result of an adjudication that the party to be attached is in fact in default, and it ceases therefore to be appropriate to call on him to *answer* his *alleged* contempt and the writ should rather take the form of a committal for a designated contempt.

Some years ago some articles appeared in the *Law Quarterly Review* (see 25 L.Q.R.) in which it was sought to cast doubt on the right of the Court to exercise a summary jurisdiction in cases of contempt, and in which it was suggested that the ancient and proper procedure was by information. But the procedure by attachment would appear to be in strict analogy

to the ancient procedure in civil suits at Common Law. The first proceeding in which was the *capias ad respondendum*. In case of offences against the Court itself, the first proceeding by analogy is to attach the offender and bring him before the Court to answer, that is to make his defence, if any.

In case of offences committed in the face of the Court, that is tantamount to a conviction, and an order of committal properly follows.

If what has been said above shews the true distinction between an attachment and committal, the following line of action would appear to result. Where the application against a party in contempt is made *ex parte* for his arrest, it should be for an attachment: where it is made on notice of motion it should be for a committal.

THE LEGAL ASPECT OF MILITARY SERVICE IN CANADA,

There is apparently some ignorance or misconception in this country as to liability for military service.

The existence, moreover, of the Militia Act as part of the law of the land is unknown to many, and its provisions have, up to the present time, been ignored, whether wisely or not it is not for us to say. It was originally framed in times of stress such as are upon us at present, and was from time to time changed and its scope enlarged to meet new conditions when emergencies seemed to render it wise to do so.

It is not the province of a legal periodical to discuss or analyse the motives or the hidden springs of action which have caused a certain class of journalists and public speakers to denounce what they call "militarism"; but it is our duty to direct attention to what is undoubtedly the law; a law which, if carried out according to the spirit of it would, in the opinion of many, best provide at the present time for the defence of Canada and the protection of Imperial interests.

The Militia Act, chapter 41 of the Revised Statute of Canada, is a re-enactment, with amendments, of the Militia Act passed by the Dominion Parliament in 1867-8 (31 Vict. c. 40). In the old Province of Canada a Militia Act was in force for many years, and eventually became chapter 35 of the Consolidated Statutes of Canada. That Act fully recognized the liability of the population to military service.

By section 75 of that Act military service was limited as follows: The militia, when called out, "may be marched to any part of the province or to any place without the province, but conterminous therewith, where the enemy is." Obviously the service would be confined to North America, and would not extend overseas.

The Act (31 Vict. c. 40) extended the liability; section 61 enacting that "Her Majesty may call out the militia or any part thereof for actual service either within or without the Dominion at any time." Section 69 of R.S.C. (1906) defines the liability as follows: "The Governor-in-Council may place the militia, or any part thereof, on active service anywhere in Canada, and also beyond Canada, for the defence thereof, at any time when it appears advisable so to do by reason of emergency."

So long as Canada remains a part of the British Empire "the defence thereof" may depend, as it depends at present, on the success of military and naval operations carried on far beyond its borders. If the words "for the defence thereof" are to be construed as meaning a defence of the actual land surface of the Dominion, the force of the enactment is practically the same in its limitations as the old Consolidated Statutes of Canada, that is to say, its force would be confined to North America.

The unhappy word "emergency" used in section 69 leaves an opening for discussion as to what constitutes an "emergency." We have seen in our recent history a denial that at that time an emergency did exist. Whether it did or did not is immaterial, as there is clearly an emergency now.

Some may still contend for the narrow construction of the section, while those who claim a larger vision will assert that the operation of the section extends to occurrences beyond an actual attack on our Canadian frontier.

As to the individual liability of our male population for military service section 15 of the present Act their liability to serve shall be divided into four classes: "Class 1, shall comprise those of 18 years and upwards but under 30, unmarried or widowers without children. Class 2, all those of the age of 30 and upwards but under 45, unmarried or widowers without children. Class 3, all those of the age of 18 and upwards but under 45, married or widowers with children. Class 4, all those of 45 and upwards but under 60. The said several classes shall be called upon to serve in the order in which they are referred to in this section."

This is a prudent and sensible classification, but by reason of the volunteer system has up to the present not been acted upon. There may be good reasons for a departure from it owing to special circumstances; but the directions contained in the Act are directory and not permissive.

Section 25 of the Act enacts that "the Governor-in-Council shall from time to time make all regulations necessary for the enrolment of persons liable to military service, and of cadets, and for all procedure in connection therewith, and for determining, subject to the provisions of this Act, the order in which the persons in the classes fixed by this Act shall serve."

The words "the classes fixed by this Act" shew clearly that class 1 shall be exhausted before class 2 is taken, and so on in the order of the Act. During this war very many married men have gone to the front leaving their families to be maintained by the public, while too many of the unmarried men have not enlisted and have remained at home. How far this abstention from service is due to pacifist instruction it is not our province to say. Whatever the cause the result has been a departure from the Act. The volunteer system, admirable in many ways, is to be credited with this departure. It is not for us to

discuss here whether this system has on the whole worked well; but, when the strain comes, as it has come, and the fighting material of the country is called upon, it certainly is worth considering whether the wise provision of the Militia Act should be ignored.

As to the power to enrol men, section 26 of the Dominion Act reads as follows: "When men are required to organize or complete a corps at any time, either for training or for an emergency, and enough men do not volunteer to complete the quota required, the men liable to serve shall be drafted by ballot. If there are inscribed on the Militia Roll more than one son belonging to the same family residing in the same house, only one of such sons shall be drawn, unless the number of names inscribed is insufficient to complete the required proportion of service men." This section has not been put into force, and the country has depended upon voluntary enlistment. The result has been that very often all the sons of one family feel it their duty to enlist, whilst all the sons of another family stay at home. Surely it is simple justice that the burden of defending their common country should be divided.

The period of service is defined by section 73 of the Dominion Act as follows:—

"73. In time of war no man shall be required to serve in the field continuously for a longer period than one year; provided that,—

"(a) Any man who volunteers to serve for the war, or for a longer period than one year, shall be compelled to fulfil his engagement; and

"(b) The Governor-in-Council may, in cases of unavoidable necessity, of which the Governor-in-Council shall be the sole judge, call upon any militiaman to continue to serve beyond his year's service in the field for any period not exceeding six months.

"(2) This section shall not apply to the permanent force."

Taking the sections of the Act as we have stated them it is clear that the duty of every man to defend his country is fully

recognized and amply provided for. In times of peace the volunteer force has been accepted as sufficient for all practical purposes and has been in many ways beneficial and supplied a felt want. Whether it is a sufficient substitute for the provisions of the Militia Act in what His Majesty calls a "grave crisis," such as now exists, is another matter.

The Government has, up to the present time (as to whether this has been wise or not it is not for us to discuss), continued the voluntary system, and paid no attention to the Militia Act. Of course it is true that the quickest way to get trained men (or at least partially trained men) to the front was at once to take advantage of the volunteer system as it was; and the work of the militia department was done promptly and efficiently; so that in that regard, in our unprepared condition, we owe much to the volunteers.

The men of class 1 have not responded to the call as they should. Many stand by and look on and shout, but stay at home and see men with wives and children going to the front and feel no shame. The application of the Act would put the burden where it belongs. We want a survival of the fittest and the fittest are those who are willing to leave wife and children, and if necessary to go to their death for the sake of their country. These feel compelled to go because somebody must go and those who ought to go first too often will not. If the young men of class 1 who so far lag behind were compelled to go the married men and others in classes 2, 3, and 4 would not be required, though they would still be ready when their turn came. Recruiting speeches appeal to the patriotic conscience, but they find no response from the slackers and shirkers; whilst the call is an impelling force to a lover of his country, even though he may have a wife and a child.

The Empire is and has been at war since August 4, 1914, and all the British Dominion and dependencies, including Canada, have been and are de jure and de facto at war also. If ever the Militia Act as part of the law of the land is to come into

force it should be now, and there are very many who think the time has come.

The subject is a most difficult one and our duty from a journalistic point of view is done when we have called attention to a statute which is not only unrepealed, but would seem to meet the occasion. The Act is one of the most important on the statute book; and, as the public is not familiar with it, it is most desirable that it should be fully discussed.

JUDICIAL CHANGES IN ENGLAND.

According to our English exchanges the legal world has suffered a great loss by the death of Sir John Farwell, one of the Lords Justices of Appeal, and for a short time a member of the Judicial Committee of the Privy Council. He was highly appreciated as a judge and as a lawyer. His name recalls the famous *Taff Vale* case (1901, A.C. 426), which won for him celebrity in the outside world.

Our exchanges also record with great regret the death of Sir Thomas Bucknill, who recently retired owing to ill-health. He is thus described by one writer: "He was not a great lawyer, and he never pretended to be one. But he was the most human of men, a good sportsman and a most loyal friend; and he displayed on the Bench the same sympathy and kindness towards witnesses and the public which endeared him to his comrades on circuit and in private life."

THE LAWS OF WAR IN ANCIENT AND MODERN TIMES.

As a matter of history as well as a matter of comparison it is interesting to refer to the rules of war in ancient Greece, before Christianity, and compare them with the practice of war in this 20th century. We make some quotations from a writer on this subject. In an article by Mr. Gustave Glotz in the *Revue de Paris* this learned writer begins by telling us that the conduct of the Greeks in dealing with smaller States was sometimes as barbarous as the treatment by the Germans of the Bel-

gians; but the Athenians had the grace to admit that they were acting in direct opposition to the *litera scripta* of their own great writers.

Polybius underlines the answer which had already been given by Socrates. Thus writes the friend of Scipio: "A generous people takes up arms against a people even criminal, not to destroy and exterminate them, but to redress and cause restitution to be made for wrongs; not to embrace in the same chastisement the guilty and the innocent, but more with the idea of sparing and saving with the first those who do not seem so": Book V., s. 14.

Thucydides had declared that a war, necessary and wise, had for its object the establishment of peace, and Aristotle without qualifications pronounced "war has for its end peace": *Politics*, IV., ss. 13, 16. The declaration of Polybius has been quoted in the introductory paragraph.

All arms are not lawful, nor are all ruses. Strabo mentions an ancient treaty by which Chalcis and Eretria agreed not to employ certain projectiles: Strabo X., ss. 1, 12. Polybius regrets the time when it was reciprocally agreed not to conceal or to use arms concealed, nor arrows shot from afar when the belligerents were engaged in a hand-to-hand fight, and he concludes that when such deception became a necessity there must have been bad generalship to account for it.

As to the treatment of non-combatants the question was more complicated, though the principles were always the same. The difference between ancient to modern times in this respect largely arose from the practice in those days of making slaves of the conquered. The writer continues: "The old law, however, which placed the property of the enemy at the discretion of the invader did not authorize pillage or sacking. This is how Plato determines the rights of the invader in Greek territory: 'When thy soldiers have Greeks as enemies, do you permit them to devastate the fields or to burn the houses? I would permit neither the one nor the other, except to bring in the year's harvest. As they are themselves Greeks, they do not wish to devastate Greece,

nor to burn the dwellings, nor to treat as enemies the whole population. . . . The conquerors shall content themselves with rescuing the crops for the vanquished, in the hope that they will thereby reconcile them, and that the vanquished will not enter upon war again'": Plato, Republic, V., s. 16.

Polybius had certainly inspired Plato as to the foregoing, for he had written: "I do not at all approve of those who permit themselves to be carried away against people of the same race, not only in pillaging the annual crops of the enemy, but in destroying the trees and all stock, without shewing any regret."

Polybius elaborates the foregoing when he writes, and he always intends to be pragmatique (vide History, I., ss. 2. 8: "To devastate a country for years is a cruelty; to spare the towns, when their destruction is not absolutely necessary, is a law of humanity": Polybius, XXIII., s. 15, 1, 2.

These laws, however, did not prevent rapacity or ferocity among the victors, and the temples, like cathedrals of our own time, were not immune. But Polybius declared himself in no uncertain language against these acts, which, in his opinion, were contrary to the laws of war.

Not less severe is Polybius on Philip V. of Macedon, when this King by way of reprisals burned the Temple of Thermæ, for he writes: "By the robbery of the offerings he committed sacrilege against the gods, and by the violation of the laws of war he rendered himself guilty before men."

Polybius gives the following résumé of what is permitted and forbidden by the usages of war.

"To take from the enemy and destroy his fortresses, ports, towns, soldiers, vessels, crops—in a word, to do everything which he can to weaken his adversary and to give effect to his own plans and operations—is a thing which the laws and the right of war constrain us to do. But without any hope of augmenting our own forces or of diminishing those of the adversary for the pursuit of wars, to destroy wantonly the temples with the statues, and all other sacred objects, is it not an act of blind passion and maniacal rage?" Polybius, V. ss. 11, 3, 4.

Incidentally M. Glotz mentions that the Greeks possessed a system of international arbitration.

Concluding, M. Glotz asserts that whenever the powers shall meet to draw up a new code of international law, they will find precedents from the Greeks, and even at this moment we can say with Plato: "It is not necessary to prolong the struggle beyond the moment when the wrongdoers shall be compelled by the innocent, weary of suffering, to give satisfaction": Plato, Republic, V., s. 16.

We may well assume that Plato's injunction will be carried out when Germany sues for peace. But it is equally sure that the struggle will be prolonged until the time arrives when the great principles for which the allies are contending has been fully vindicated.

LIABILITY FOR SPREAD OF FIRE.

How far is a man who lights a fire on his own land liable for damage done by the fire spreading to his neighbour's land? It appears not to be settled whether the neighbour can recover damages against the lighter of the fire in the absence of some degree of negligence in the latter. One way of stating the question would be: Is the liability to the injured neighbour an absolute one and within the rule of *Rylands v. Fletcher* (1868), L.R. 1 Exch. 265, 3 H.L. 330, or does it depend on proof or presumption of negligence?

The principle of *Rylands v. Fletcher* is thus stated in the words of Blackburn, J.: "The person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape." *Rylands v. Fletcher* had to do with water and the damage done by its escape from a reservoir, and Blackburn, J., gave as instances of the application of the above rule the damage done by escaping cattle, by the influx of filth into a cellar, and by the diffu-

sion of fumes and noisome vapours from alkali works. Singularly enough, fire (a fairly obvious danger to neighbours) is not mentioned. That the rule does apply to fire is shewn by the cases of *Jones v. Festiniog Railway Co.* (1868), L.R. 3 Q.B. 733, and *Powell v. Fall* (1880), 5 Q.B.D. 597, both relating to the lighting of grass by sparks from an engine. The subject of liability for the escape of fire is, however, dealt with in more than one statute, and occupies rather a place by itself both in statutes and in the common law.

With respect to the common law the better opinion seems to be that the liability for spread of a fire lighted on one's own premises was absolute and did not depend on negligence. In an old case in the Year Books—*Beaulieu v. Fingham*, 2 Hen. 4, 18, pl. 5—the custom of the realm is thus stated: *Secundum legem et consuetudinem regni nostri Angliæ . . . quilibet de eodem regno ignem suum salvo et secure custodiat, et custodire teneatur, ne per ignem suum damnum aliquod vicinis suis ullo modo eveniat.* A statute of Anne dealt with this question, and finally came the Fires Prevention (Metropolis) Act, 1774 (14 Geo. III., c. 78), which, by section 86, enacted that no action should be brought “against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall . . . accidentally begin, nor shall any recompense be made by such person for any damage suffered thereby.”

This enactment has been held not to apply to cases where a fire has been intentionally lighted and has then spread to a neighbour's land: *Filliter v. Phippard* (1847), 11 Q.B. 347. Where, therefore, an ordinary occupier of land has himself (or by his servants or agents) lighted the fire, the question whether his liability for damage done to his neighbour is absolute, or qualified by the necessity for proving negligence, must still be governed by the rules of the common law, and by decided cases, independently of statute law. It should be noticed that fires from engine sparks come under the Railway Fires Act, 1905. In *Filliter v. Phippard*, *supra*, it was also held that section 86

of the Act of 1774 does not apply where a fire is caused by negligence, and the plaintiff in that case recovered by reason of negligence on the part of the defendant's servants in lighting and managing the fire. There appears to be no modern case of authority in the English reports, deciding that a man who lights a fire on his own land is liable absolutely to his neighbour for damage done by the spreading of the fire to the latter's land, independently of negligence. There are cases to the contrary in the American reports, and negligence is, in the United States, held to be the gist of the cause of action. The English text books also are divided on the subject.

Of these text books it will be sufficient to refer to two. In the 6th edition (1912) of Clerk and Lindsell's *Torts*, p. 470, it is said: "The making of a fire involves the bringing on land of something not naturally there, and therefore the owner of the fire is bound to keep it in at his peril," and a person who kindles a fire is by the common law "absolutely liable to others whose property was injured by such fire spreading." The contrary opinion will be found expressed in the 3rd edition (1912) of Salmond's *Law of Torts*, pp. 224-226. The author summarizes his conclusion by saying that the occupier of land from which fire escapes is liable if the escape is due to negligence, but "he is not responsible for the act of a stranger, or for damage which is not caused by negligence on the part of any one."

The divergence in the views of the text writers is reflected in the cases on the subject that are to be found in the Colonial reports. Support can be found in these reports for each view. Under these circumstances the English practitioner may usefully peruse the latest of these oversea cases, in which the Supreme Court of South Australia has expressly decided that the rule of English law now is that the person who lights a fire on his own land does so at his own peril, and must answer for the consequences, unless he can shew something extrinsic analogous to *vis major*. Thus the position adopted in Clerk and Lindsell's

Torts (*supra*) is upheld as against the view that negligence constitutes the gist of the action for damage.

The South Australian case referred to is *Young v. Tilley* (1913) S.A.R. 87, and a very short summary of the report may be found useful and instructive. The defendant lighted a fire on his own land—a tract of country land covered with grass—and the grass caught fire and spread to the grass on the plaintiff's land. The fire was lighted in an iron receptacle—a proper outdoor fireplace—and it was found as a fact that there was no negligence at all on the defendant's part. The liability of the defendant under these circumstances was argued as a point of law before the Supreme Court of three judges. The arguments for and against the absolute liability of the defendant were dealt with at some length in the leading judgment, and in the result it was held that the defendant was liable, and that the fire was not "accidental" within the meaning of section 86 of the Act of 1774. Most of the English authorities were referred to, and the decision of the South Australian court would probably commend itself to the English courts should a similar question come before them.

Ten years ago the law was laid down to the same effect in New Zealand by the Court of Appeal in *Kelly v. Hayes* (1902) 22 N.Z.R. 429, and it was there held "that if a person lights a fire on his own land, he must at his peril prevent it spreading to the land of his neighbours." This case was not referred to in *Young v. Tilley*, but a Canadian case (*Furlong v. Carroll* (1882) 7 Ont. App. 145) was referred to in argument in support of the view that some degree of negligence is necessary in order to fasten liability on the person lighting the fire. In that case, however, the injured neighbour was able to shew a certain amount of negligence in the defendant's conduct, he having thrown a burning match on to some dry stubble. The New Zealand case and the South Australian case above referred to seem to be the only instances of express decision in modern British courts that the liability of a person lighting a fire is absolute.—*Solicitors' Journal*.

REVIEW OF CURRENT ENGLISH CASES.

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**COSTS—MARRIED WOMAN—LIABILITY OF MARRIED WOMAN TO BE
PERSONALLY ORDERED TO PAY COSTS—ABSENCE OF SEPARATE
PROPERTY.**

Kennard v. Kennard (1915) P. 194. This was a divorce suit by a wife, who was at the time herself living in adultery. She obtained a decree *nisi* by concealment of facts, which, on the intervention of the King's Proctor, was now rescinded, and the question argued was whether the petitioner could be personally ordered to pay the costs of the King's Proctor, it not appearing that she had separate estate. The Matrimonial Causes Act, 1878, empowers the Court to make such order as to the costs of the King's Proctor as may seem just. Deane, J., was of the opinion that the Court had jurisdiction to order a married woman to pay costs whether it was shewn that she had separate estate or not, and in this case the petitioner having, as the learned Judge puts it, "had the impudence to come and ask for a decree *nisi* when she was habitually committing adultery," he thought it was a proper case to order her to pay the King's Proctor's costs, which he accordingly did.

**POWER OF APPOINTMENT—POWER TO A AND B JOINTLY BY DEED,
AND SURVIVOR BY WILL—RESERVATION OF POWER OF REVO-
CATION BY DEED TO APPOINTORS AND THE SURVIVOR—SUBSE-
QUENT REVOCATION AND NEW APPOINTMENT BY SURVIVOR BY
DEED—VALID REVOCATION—INVALID APPOINTMENT.**

In re Weightman Astle v. Wainwright (1915) 2 Ch. 205. By a marriage settlement certain property was settled upon trust for the children of the marriage in such shares as the husband and wife during their joint lives by deed should appoint, with or without power of revocation, and in default of appointment, or so far as such appointment should not extend, then as the survivor by will or codicil should appoint. The husband and wife made a joint deed of appointment reserving a power of revocation in favour of themselves during their joint lives by deed, or the survivor of them by deed. After the death of the husband the wife executed a deed of revocation, and by the same deed purported to make a new appointment. It was not contended that the widow had any power to make a new appointment by deed, but it was argued that as the revocation was made for the purpose of

making the new appointment, as the new appointment was invalid the revocation failed and the original appointment stood. But Joyce, J., held that although the new appointment was invalid the revocation was good.

POWER OF APPOINTMENT—POWER TO APPOINT BY WILL DURING COVERTURE—WILL MADE DURING HUSBAND'S LIFETIME—DEATH OF HUSBAND LEAVING WIFE SURVIVING.

In re Safford, Davies v. Burgess (1915) 2 Ch. 211. By a marriage settlement made by the wife's father, funds were settled upon the usual trusts during the joint lives of the husband and wife and the life of the survivor, and after the death of the survivor "for the children of the marriage," or, in case there should be no issue, "upon trust for such person or persons as" the wife "shall by will during the continuance of the said intended coverture, direct or appoint," and in default of, and subject to, any such appointment, in trust for the settlor, his executors, administrators and assigns. There was no issue of the marriage. During the coverture the wife made a will appointing the fund. She survived her husband, and died without revoking the will. It was contended, on behalf of the father's representatives, that the wife's appointment was invalid, because the will did not take effect during coverture; but Joyce, J., who tried the action, held that there was no reason for implying a condition that the wife's will should not be a valid appointment unless she also died during coverture. He therefore came to the conclusion that the power had been validly exercised.

WILL—CONSTRUCTION—SUBSTITUTIONAL GIFT—PARENT'S SHARE "SHALL BE PAID" TO CHILDREN—JOINT TENANCY OR TENANCY IN COMMON.

In re Clarkson, Public Trustee v. Clarkson (1915) 2 Ch. 216. By the will in question in this case the testator bequeathed leaseholds on trust to pay the rents to his grandson for his life, and upon his death to sell and pay the proceeds unto and amongst his nephews and nieces as tenants in common, and in case of the death of any of the nieces or nephews he directed that the children of such deceased nephew or niece "shall be paid a parent's share." The testator died in 1864, and left only one nephew, who died in 1880, and no niece. The grandson died in 1912. The nephew had two sons, one of whom died in 1913. The question, therefore, was whether the surviving son of the nephew was solely entitled, or whether the estate of his deceased brother

was entitled to a half. This depended on whether the children of the nephew took as tenants in common or as joint tenants. The representatives of the deceased brother claimed that the words, "shall be paid," imported a severance, and that therefore they took as tenants in common, relying on a dictum of North, J., *In re Atkinson* (1892) 3 Ch. 52 (at p. 54), but Eve, J., considered that this dictum was not well founded, and was opposed to the decision of Knight-Bruce, V.C., in *Gordon v. Atkinson*, 1 DeG. & Son 476, and he therefore held that the children of the deceased nephew took as joint tenants, and the survivor of them was therefore now solely entitled.

COMPANY—GUARANTY—LIABILITY OF MEMBERS TO CONTRIBUTE—

**CALL OF FULL AMOUNT ON TWO MEMBERS ONLY—DELAY IN
PAYING PREVIOUS CALLS—INJUNCTION—DECLARATION OF
RIGHT.**

Galloway v. Hallé Concerts Society (1915) 2 Ch. 233. The defendant society was an incorporated musical society, limited by guaranty, and the articles provided that each member should be liable to contribute, and should, when demanded, pay to the committee any sum not exceeding £100 (therein called the contribution) in addition to any liability in case of winding up under the guaranty clause in the memorandum, and that the committee might from time to time make calls, as they thought fit, upon each member in respect of all moneys unpaid on his contribution, and that each member shall pay every call so made on him as appointed by the committee. The plaintiffs were two members of the society who had objected to the policy of the committee and had been dilatory in payment of two small calls, and had also omitted to pay a third call of £10 made in June, 1914. The committee, therefore, in March, 1915, passed a resolution calling up the entire uncalled balances of these two members, the reason alleged being their refusal to pay the previous calls, and the trouble and expense thereby incurred by the society. The plaintiffs claimed an injunction, and also a declaration that the resolution of the committee was invalid. Sargant, J., held that, even if the committee had power under the articles, in a proper case, to make calls on certain members without making similar calls on the rest, no sufficient reason had been shewn for so doing as against the plaintiffs, and the resolution was declared to be invalid.

**WILL—SOLDIER—ACTUAL MILITARY SERVICE—ATTESTATION OF
TWO WITNESSES—GIFT TO ATTESTING WITNESS—WILLS ACT,
1837 (1 VICT. c. 26), ss. 11, 15—(R.S.O. c. 120, ss. 14, 17).**

In re Limond, Limond v. Cunliffe (1915) 2 Ch. 240. In this

case the validity of a soldier's will of personal estate was in question. At the time of the testator's death he was serving with a regiment in India which was acting as the rear and baggage guard of a column of troops engaged in the delimitation of a frontier after hostilities had been concluded, and was mortally wounded by a fanatic. His will was signed in the presence of, and attested by, two witnesses, to one of whom he made a bequest. Two questions were raised: (1) whether the testator was engaged "in actual military service," and (2) whether the gift to the witness was valid. Sargant, J., answered both questions in the affirmative. With regard to the first point, he said that it had been held in various cases that the commencement of military service is when the mobilization takes place, and that in his opinion the actual military service does not cease until the conclusion of the operations, and in this case he considered the delimitation of the frontier was an operation incident to the war. With regard to the second point, his Lordship was of the opinion that sec. 15 (R.S.O. c. 120, s. 17) applies only to witnesses attesting wills under the preceding provisions of the Wills Act, and particularly the provision requiring wills to be executed in the presence of two witnesses in the presence of each other and in the presence of the testator; and he held that, though the will was sufficiently executed under the Wills Act, yet the testator intended to make a soldier's will, and that it was entitled to the privilege of s. 11 (R.S.O. c. 120, s. 14).

WILL—CHARITABLE GIFTS—GIFT TO GOVERNING BODY OF SCHOOL TO BUILD FIVES COURTS—GIFT TO HEADMASTER OF SCHOOL INCOME TO BE APPLIED FOR ANNUAL PRIZE FOR ATHLETIC SPORTS—STATUTE OF ELIZABETH (43 ELIZ. C. 4)—(R.S.O. c. 103).

In re Mariette, Mariette v. Aldenham School (1915) 2 Ch. 284. By the will in question in this case the testator left a sum of "£1,000 to the governing body of Aldenham School for the purpose of building five courts (or squash racquet courts), or for some similar purpose that shall be decided by a majority of the house masters at the time of my death:" and "£100 to the headmaster for the time being of Aldenham School, upon trust to use the interest to provide a prize for some event in the school athletic sports every year, agreed upon by the committee of the athletic sports." Aldenham school was founded as a free Grammar school and was admittedly a charity within the Statute of Elizabeth, 43 Eliz. c. 4 (see R.S.O. c. 103, s. 2 (2) (a)). There were 208 pupils between the ages of 10 and 19, nearly all of

whom were boarders. It was contended on behalf of residuary legatees that the purposes for which the above two bequests were made, were not charitable, and therefore that they were void, but Eve, J., who tried the action, overruled that contention, being of the opinion that the provision of means for carrying on athletic games was a necessary part of the work of the school, and that both gifts were therefore good, charitable gifts, within the Statute.

**WILL—ANNUITIES CHARGED UPON INCOME AND CORPUS OF ESTATE
—INSUFFICIENCY OF INCOME—DEFICIENCY PAID OUT OF CORPUS—RECOUPMENT OF CORPUS—TENANT FOR LIFE AND REMAINDERMAN.**

In re Croxon, Ferrers v. Croxton (1915), 2 Ch. 290. By the will in question in this case the testator bequeathed three annuities which he charged on the income and corpus of his residuary estate. The income at first proved insufficient to pay the annuities in full and the deficiency was made good out of the corpus. Owing to the death of one of the annuitants the income had become sufficient to pay the two remaining annuities and leave a surplus, and the question Eve, J., was called on to decide was whether the anticipated surplus as between the tenant for life and remainderman should be applied to recoup the corpus, and the learned Judge held that as the annuities were charged both on income and corpus, the tenant in remainder had no right to insist that the corpus should be recouped.

WILL—CODICIL—RESIDUARY BEQUEST IN WILL—BEQUEST IN CODICIL OF “THE RESIDUE OF MY ESTATE NOT BEQUEATHED BY THE ABOVE WILL.”

In re Stoodley, Hooson v. Locock (1915), 2 Ch. 295, deals with one of the vagaries which testators are constantly indulging in at the expense of their beneficiaries. In this case, by his will, the testator disposed of his residuary estate, one-third in trust for the Society for Promoting Christian Knowledge, and the other two-thirds to the vicar of a church for the purposes of his church. Subsequently, ten days before his death, he made a codicil in which, after referring to the will, he continued: “The residue of my estate not bequeathed by the above will I give and bequeath to Mabel Abbie Locock . . . absolutely and I appoint her sole executrix of this codicil.” The legatee named in the

codicil contended that the codicil inferentially revoked the residuary bequest in the will, but Eve, J., decided that all that passed by the codicil was such portion of the residue (if any) as might ultimately turn out not to have been effectually disposed of by the will, and that there was no revocation of the clear and unambiguous gift of the residue contained in the will.

WILL—CONSTRUCTION—REAL ESTATE—DEVISE TO A. “OR HIS ISSUE”—ESTATE TAIL—WORDS OF LIMITATION OR SUBSTITUTION.

In re Clerke, Clowes v. Clerke (1915), 2 Ch. 301. In this case a will was in question whereby the testator devised a remainder in real estate to his brother S. H. Clerke “or his issue.” S. H. Clerke survived the testator but predeceased the tenant for life leaving 3 children and 3 grandchildren. The question was whether the words “or issue” were words of substitution or limitation. If they were words of substitution it was conceded the 3 children and 3 grandchildren would take as joint tenants; but if they were words of limitation then S. H. Clerke took as tenant in tail, and his eldest son alone would be entitled. Eve, J., decided that the words were words of limitation and created an estate tail in S. H. Clerke.

DOCK—CONTRACT FOR USE OF DOCK—EXEMPTION CLAUSE—DAMAGE TO SHIP FROM UNFITNESS OF BLOCKS PROVIDED BY DOCKOWNER—LIABILITY OF DOCKOWNER.

Pyman S.S. Co. v. Hull and Barnsley Ry. (1915) 2 K.B. 729. The Court of Appeal (Lord Reading, C.J., Eady, L.J., and Bray, J.) have affirmed the decision of Bailhache, J. (1914) 2 K.B. 788 (noted *ante* vol. 50, p. 431). It may be remembered that the action was by shipowners against dockowners for damages sustained by the plaintiffs' ship by reason of the insufficiency of the blocks supplied by the defendants, which, by the agreement between the parties, the defendants were to supply. The contract provided that the defendants were not to be liable “for any accident or damage to a vessel going into or out of, or whilst in the dock”; and Bailhache, J., held that this exemption protected the defendants from liability for damages occasioned by the insufficiency of the blocks provided.

CRIMINAL LAW—TRADING WITH THE ENEMY—OBTAINING GOODS FROM ENEMY—TRADING WITH THE ENEMY ACT, 1914 (4-5 GEO. 5, c. 87), s. 1.

The King v. Oppenheimer (1915) 2 K.B. 755. This was a

prosecution for trading with the enemy contrary to the Imp. Act, 4 & 5 Geo. 5, c. 87, s. 1. The facts were that the accused had business dealings with a German firm of lithographers in Nuremberg, and at the outbreak of the war the German firm had a number of lithographic transfers to which the defendants were entitled. These transfers were prints on grease-proof paper taken from stones, and which could be transferred to other stones by the defendants in England. After the outbreak of the war the defendants procured the delivery of these transfers, and were convicted for committing a breach of the Act above referred to at a trial before Atkin, J., and the conviction was affirmed by the Divisional Court (Lord Reading, C.J., and Bray and Lush, JJ.).

BASTARDY—APPLICATION DISMISSED BY JUSTICES FOR WANT OF CORROBORATION—RENEWAL OF APPLICATION—RES JUDICATA.

McGregor v. Telford (1915) 3 K.B. 237, was an application by the mother of an illegitimate child against the putative father, under the Bastardy Act. It was objected that a previous application had been made by the mother and dismissed for want of corroborative evidence, and it was contended on behalf of the respondent that this constituted *res judicata*. The Justices overruled the objection, heard the complaint, and ordered the respondent to pay a weekly sum for the support and education of the child. On a case stated, the Divisional Court (Lord Reading, C.J., and Ridley and Scrutton, JJ.) held that the dismissal of the prior application was in the nature of a nonsuit, and did not preclude the renewal of the application on better evidence.

CONTRACT—WRITING—RESCISSION OR VARIATION—SUBSEQUENT PAROL AGREEMENT—EVIDENCE—ADMISSIBILITY—STATUTE OF FRAUDS.

Williams v. Moss' Empires (1915) 3 K.B. 242. In this case the plaintiff entered into an agreement in writing, which was not to be performed within a year, to perform at the defendants' theatre on certain terms, including the payment of salary at a specified rate. During the currency of the contract, and within less than a year from its termination, the parties verbally agreed to a variation of the plaintiff's salary for a part of the remainder of the engagement. The action was brought to recover the salary earned since the verbal agreement at the rate specified in the original contract. The defendant set up the subsequent verbal agreement. The Judge of the County Court held that, as the original contract was required to be in writing, it could not be

varied by a subsequent parol agreement. But the Divisional Court (Shearman and Sankey, JJ.) held that he was wrong, and that the true principle is that where the agreement varying an agreement, which would be invalid if it were not in writing, is itself of such a character that it is bound to be in writing, then, unless it is in writing it cannot be relied on to vary or rescind the original contract, and must be disregarded. But here the subsequent parol agreement was not required by law to be in writing, and was therefore valid.

INSURANCE—CONSEQUENTIAL LOSS—ASSESSMENT OF LOSS BY
INSURED'S AUDITOR—ASSESSMENT BY AUDITOR—CONCLUS-
IVENESS OF ASSESSMENT.

Recher v. North British & M. Insce. Co. (1915) 3 K.B. 277. This was a case stated by arbitrators. The plaintiffs were insured by defendants against loss by fire, under a policy which provided that in the event of damage by fire to their property the defendants would pay an agreed percentage on the amount by which the turnover of the plaintiffs' business in each month should be less than the turnover for the corresponding month in the year preceding the fire. And the policy further provided that the amount of all losses covered thereby should be assessed by the insured's auditors. A fire having occurred, the auditors gave certificates stating the difference between the turnover for the months after the fire and the corresponding months in the year preceding the fire, and the percentage payable. An arbitration was held to determine the amount payable under the policy, and the auditors' certificates were put in as evidence. The question submitted to the Court was how far the certificates were conclusive. The Divisional Court (Lord Reading, C.J., and Ridley and Scrutton, JJ.) held that the certificates were conclusive as to the amount payable in respect thereof, except so far as it could be shewn that the auditor had misdirected himself in point of law, or had omitted to take into consideration some material fact; and that the auditor might be cross-examined on those points, and the insurance company might call direct evidence to shew that the auditor had omitted to take into consideration that the losses of turnover were wholly or in part due to other causes than the fire, but not to shew that the auditors' conclusions of fact were erroneous.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

Que.]

LAREAU v. POIRIER.

[June 24.]

Sale of land—Contract—Deferred payment—Omission of date for payment—Completion of contract—Acceptance by purchaser—New term—Instruments of title—Delivery—Acts, 1025, 1235, 1491-1494, 1533, 1534 C.C.

A contract for the sale of land in the Province of Quebec, by which the date of the deferred payment of an instalment of the price is not fixed, is, nevertheless, according to the law of that province, a completed contract of which specific performance may be enforced. (DUFF and BRODEUR, JJ., dissented.)

In his letter accepting the offer of sale, the purchaser requested the vendor to send the documents of title, and certified abstract of the registrar of deeds affecting the property, to his notary.

Held, per FITZPATRICK, C.J., and ANGLIN, J., that, by this request, it was not intended to stipulate a new term to the contract.

*Per BRODEUR, J.:—*Although the vendor is obliged to furnish the purchaser with the documents of title, including the Registrar's certified abstract, yet as, in the present case, it appeared that the vendor made it a condition that the titles and certificate were not to be delivered into the possession of the purchaser, the request in the letter of acceptance was a stipulation of a new term which left the contract incomplete. *La Banque Ville Marie v. Kent*, Q.R. 22 S.C. 162, and *Sauvé v. Picard*, 20 Rev. de Jur. 142, referred to. Judgment appealed from (Q.R. 23 K.B. 495) affirmed. Appeal dismissed with costs.

St. Germain, K.C., and *C. A. Archambault*, for appellant.

St. Jacques, for respondent.

Province of Ontario

SUPREME COURT.

Meredith, C.J.C.P.]

RE CIMONIAN.

[23 D.L.R. 363]

Aliens—Naturalization—Alien Enemies.

An alien enemy is not within the provisions of the Naturalization Act, R.S.C. 1906, ch. 77, and application for naturaliza-

tion under that Act, if it appears that the applicants are alien enemies, may be refused upon the Judge's own initiative, though no opposition has been filed and no objection offered.

The King v. Lynch, [1903] 1 K.B. 444, and *Porter v. Freudenberg*, [1915] 1 K.B. 857, followed; *In re Herzfeld* (1914), 46 Que. S.C. 281, disapproved.

M. A. Secord, K.C., for applicants. No one opposed the applicants.

ANNOTATION ON THE ABOVE CASE FROM D.L.R.

A declaration of war by a foreign country against a foreign power imports a prohibition of commercial intercourse with the subjects of that power: *Barrick v. Buba*, 2 C.B (N.S.) 563.

The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of trade, as a subject of the power under whose dominion he carries it on, and as an enemy of those with whom that power is at war: *The Gerasimo*, 11 Moore P.C. 88.

Trading with an enemy without the King's license is illegal; and it is illegal for a subject in time of war, without the King's license, to bring even in a neutral ship goods from an enemy's port, which were purchased by his agents resident in the enemy's country, after the commencement of hostilities, although it may not appear that they were purchased from an enemy: *Potts v. Bell*, 2 Esp. 612.

Merchants, subjects of neutral states, resident in the territories of an ally, are, for the purposes of war, considered as domiciled in the territories of an ally, and prohibited from trade with a belligerent: *The San Spiridione*, 2 Jur. (n.s.) 1238.

Commerce by a person resident in an enemy's country, even as a representative of the Crown of this country, is illegal and the subject of prize, however beneficial to this country, unless authorized by license: *Ex p. Baglehole*, 18 Ves. 528; *McConnell v. Hector*, 3 Bos. & P. 113.

The character of an alien and a British subject cannot be united in one person: *Reg. v. Manning*, 2 Car. & K. 887.

The common law rule strictly limiting an alien enemy in his civil rights is now modified in his favour when he resides in this country by a license or under protection of the Crown: *Topay v. Crows Nest Pass Coal Co.*, 18 D.L.R. 784.

PROOF OF ALIENAGE.—To prove that a person was an alien enemy at the time of the action, it is not enough to shew that he was some time before domiciled in a territory which has become hostile, without shewing that he was a native of that territory: *Harman v. Kingston*, 3 Camp. 152.

The mere production of a passport found on a prisoner, which is proved

to be granted by the authorities of a foreign state to natural-born subjects only, is not evidence of his being an alien: *Reg. v. Burke*, 11 Cox C.C. 138.

To prove a replication of license to a plea of alien enemy, it is not enough to prove that a license was granted to the plaintiff with an allowance to undertake a voyage, which did not terminate until the commencement of hostilities, and that after the termination of the voyage he was at large here without molestation: *Boulton v. Dobree*, 2 Camp. 163.

HOSTILE NEUTRALS.—A neutral residing in an enemy's country, as consul of a neutral state, and who also trades there as a merchant, is to be regarded as an enemy: *Sorensen v. Reg.*, 11 Moore P.C. 141.

An alien carrying on trade in an enemy's country, though resident there also in the character of consul of a neutral state, is considered an alien enemy, and as such disabled to sue, and liable to confiscation: *Albretcht v. Sussman*, 2 Ves. & B. 323.

A native of a neutral state taken in an act of hostility on board of an enemy's ship, and brought to England as a prisoner of war, is not disabled from suing, while in confinement, on a contract entered into as a prisoner of war: *Sparenburgh v. Bannatyne*, 1 Bos. & P. 163.

An action may be maintained by a person of an enemy nationality who is neither residing nor carrying on business in an enemy country, but is residing either in an allied or a neutral country and is carrying on business through his partners in that allied country: *Re Mary Duches, etc.*, 31 T.L.R. 248.

TEMPORARY OCCUPATION.—A temporary occupation of a territory by an enemy's force does not, of itself, necessarily convert the territory so occupied into hostile territory or its inhabitants into enemies: *The Gerasimo*, 11 Moore P.C. 88.

In the case of *Société Anonyme Belge, etc.*, v. *Anglo-Belgian Agency*, 31 T.L.R. 624, the plaintiffs were a company incorporated under the laws of Belgium. Their registered office was in Antwerp. Soon after the outbreak of the war, the business of Antwerp was closed and the books were removed to London. The larger part of Belgium, including Antwerp, was in the effective military occupation of Germany. The business of the plaintiff company had since been wholly carried on in London. The company had mines in Portugal, and the whole of the output was being sold in England or in France. It was held, that the plaintiff company was not an enemy within the meaning of any of the Acts or Proclamations relating to trading with the enemy.

CONTRACTS.—A contract with an alien enemy made in time of war cannot be enforced in the Courts here: *Willison v. Pattison*, 7 Taunt. 439.

If an alien enemy, a prisoner of war, makes a contract, it may be enforced by the King for the benefit of the Crown. And if the Crown does not enforce it, the prisoner may sue on it after the return of peace: *Maria v. Hall*, 1 Taunt. 33n.

The fact that a party to a contract becomes an alien enemy on the outbreak of the war does not necessarily have the effect of abrogating the contract, but will merely suspend all obligations thereunder during its continuance: *Zinc Corporation v. Skipworth* (No. 1), 31 T.L.R. 106. But,

in allowing an appeal from this judgment in 31 T.L.R. 107, it was said, that an action by one party to a contract for a declaration as to its construction will not lie in the absence of the other party, where there is no third party whose interests make it necessary to determine its construction.

A c.i.f. contract for the sale of hides entered into between the subjects of an allied state with the subjects of a state afterwards at war with the allied states becomes illegal on the outbreak of the war, and is rendered incapable of breach for which no recovery can be had: *Kreglinger & Co. v. Cohen, etc.*, 31 T.L.R. 592.

During the war of England with the United States in 1812, a native of America made several consignments to a British subject in England, who would dispose of them in France and afterwards remit the proceeds. In an action by the American against the assignee in bankruptcy of the estate of the British subject, it was held, that he could only prove as a creditor for the cargoes shipped after the signing of the peace preliminaries at Ghent, but not for the cargoes that arrived during the war: *Ogden v. Peele*, 8 D. & R. 1.

BILLS AND NOTES.—An action may be maintained here by a neutral on promissory notes given to him by a British subject in an enemy's country for goods sold there: *Houret v. Morris*, 3 Camp. 303.

Though a bill drawn by a prisoner of war in France upon a person-resident in England in favour of an alien enemy could not have been originally enforced, the drawer is liable on a subsequent promise in time of peace: *Duhammel v. Pickering*, 2 Stark. 90.

It is no defence to an action to a bill of exchange that the plaintiff sues in trust for an alien enemy: *Daubuz v. Morshead*, 6 Taunt. 332.

An alien, to whom a bill, drawn on England by a British subject detained prisoner in France during war with England, payable to another British subject also detained there, is indorsed by the latter, he may sue on it in this country after the return of peace: *Antoine v. Morshead*, 6 Taunt. 237.

PARTNERSHIPS.—Where a partnership contract is no longer possible of being carried out according to its terms by reason of war, as where a license to trade as partners on the terms that no payments should be made to or for alien enemies, while some of the very partners are alien enemies, the Court will make an order *ex parte* for the appointment of a receiver and manager of the business carried on by the partnership: *Armitage v. Borgman*, [1915] W.N. 21, 59 S.J. 219.

In an action on a bill of exchange and for goods supplied before the war by a firm, of which one of the partners was an alien enemy, but which partnership was dissolved by mutual consent at the outbreak of the war, does not preclude the British partner from recovering thereon by reason of secs. 6 and 7 of the Trading with the Enemy Act: *Wilson v. Ragosine & Co.*, 31 T.L.R. 264.

An action is maintainable by a receiver of a partnership of whom one of the partners is an alien enemy residing in the enemy country, to recover the price of goods sold by the partnership: *Rombach v. Gent*, 31 T.L.R. 492.

CORPORATIONS AND COMPANIES.—A limited company registered in this country according to English law is not prevented from suing by the fact

that almost all the shares are held by alien enemies: *Amorduct Mfg. Co. v. Defries*, 31 T.L.R. 69.

A company which is registered in England, and carries on business there, but in which the majority of the shares are held by alien enemies, is entitled to sue for the price of goods sold and delivered, if it is not employed to sell the goods as the agent of an alien enemy with the object of remitting the money abroad, inasmuch as the right of such company to trade in England and the right of British subjects to trade with it in England are recognized by the Trading with the Enemy Act, 1914, and the Proclamations issued thereunder: *Continental Tyre, etc., v. Tilling Ltd.*, 31 T.L.R. 77.

Where an action for the infringement of patent, registered in the joint names of an English and an enemy company, is brought nominally in the names of both companies, but in whom the sole right of prosecuting proceedings for the infringement is in the British company, the Court will not entertain an objection to the proceedings because one of the companies is an alien enemy, since to deny the British company the right to prosecute the action would be to deny to a British subject the right to bring an action for his own protection: *Mercedes Daimler Motor Co. et al. v. Maudslay Motor Co.*, [1915] W.N. 54, 31 T.L.R. 178.

An officer of an enemy manufacturing company in charge of a manager who had authority to enter into contracts, and to sue and be sued on behalf of the company, is not a "branch" in the sense of sec. 6 of the Trading with the Enemy Proclamation, and that the payment of money after the date of the proclamation, in fulfilment of a previous contract, is not a "transaction," in the sense of that section, so as to be within the exception of transactions by or with the enemy having a branch situated in British territory: *Orenstein, etc., v. Egyptian Phosphate Co.*, [1915] S.C. 55.

BANKS.—In an action by an enemy banking company on a bill it was pleaded that the plaintiffs were alien enemies, and that their license under the Aliens Restriction Act, 1914, did not authorize their London branch to present and receive payment of the bill. It was held, that the transactions permitted by the license were not limited to transactions with the London branch, and that the transaction would in the ordinary course have been carried out in London; nor was the presentment or collection a new transaction, and that they were, therefore, entitled to recover: *Direction Der Disconto-Gesellschaft v. Brandt & Co.*, 31 T.L.R. 586.

The Court will not make a vesting order under sec. 4 of the Trading with the Enemy Act of a disputed balance of an enemy bank in an English bank, since that would be placing the custodian in the position of an assignee of a disputed debt: *Re Bank für Handel, etc.*, [1915] W.N. 145.

INSURANCE.—By a Proclamation issued with statutory authority it was declared that, where an enemy had in Britain a branch carrying on insurance business, transactions with the branch should be considered as transactions with the enemy. It was held that the Proclamation was not retrospective, and that, in any case, an action against the enemy insurance company to recover a loss was not a transaction within the meaning of the Proclamation, and that the right of suit in respect of the obligation to pay the loss was not suspended by reason of the war: *Ingle v. Mannheim Continental Ins. Co.*, [1915] 1 K.B. 227, 31 T.L.R. 41.

Policies of life insurance pledged with an alien enemy as security for bills cannot be recovered by the trustee in bankruptcy as the custodian under sec. 4 (1) of the Trading with the Enemy Act, 1914, where the alien enemy is beyond the jurisdiction of the Court, and no assignment of the policies had been executed in favour of the enemy; that it is not the object of the Act that the custodian should be used as a medium for recovering for the trustee the bankrupt's property which during the war he could not recover for himself: *Re Reuben*, 31 T.L.R. 562.

RECEIVERS AND TRUSTEES.—The Court will appoint a receiver of a partnership business, of which one of the owners is an alien enemy, if the business is an ordinary commercial enterprise, and not within sec. 3 of the Trading with the Enemy Act, 1914: *Rombach v. Rombach*, 59 S.J. 90.

An application for the appointment of a controller of an enemy firm or company under sec. 3 of the Trading with the Enemy Act, 1914, may be made by an originating motion. A controller so appointed may be ordered to furnish the usual security required from a receiver and to account for, and report on, periodically, as to the position of the business and the results of carrying it on: *Re Meister Lucius, etc.*, 59 S.J. 25, 31 T.L.R. 28.

In the case of *Re Bechstein* (No. 1), 58 S.J. 863, a large firm, composed of alien enemies, had a London branch employing a large number of British workmen. The Court appointed the British assistant-manager of that branch to be receiver and manager upon his undertaking (1) not to remit goods or money forming assets of the defendant's business to any hostile country; (2) to endeavour to obtain from the Crown a license to trade.

Under the rules promulgated under the Trading with the Enemy Act, 1914, for the purpose of obtaining an order vesting in the Public Trustee all the property of an enemy company having a branch in England, an originating summons must be issued in pursuance of the rules, and the matter come on first in Chambers, and where the alien enemy is interned in an internment camp, a letter should be sent to him enclosing a copy of the originating summons: *Re Company*, 59 S.J. 217.

PRINCIPAL AND AGENT.—A British subject, acting as an agent for an undisclosed principal who is an alien enemy, is not debarred at common law, apart from the Trading with the Enemy Act, 1914, and the Proclamations issued thereunder, from maintaining an action against British subjects for the price of goods; and, upon his consenting to a stay of execution until a hearing under the Trading with the Enemy Amendment Act, 1914, for the vesting of the moneys in the custodian thereunder, he will be entitled to judgment: *Schmidt v. Van Der Veen*, 31 T.L.R. 214.

The agent of a principal who is an alien enemy is not entitled to bring an action against him for a declaration that the agent be entitled to collect debts due the principal, and to pay debts due from the latter, or for the appointment of a receiver of the assets of the principal's business in this country: *Maxwell v. Grunhut*, 31 T.L.R. 79, 59 S.J. 104.

In following the case of *Maxwell v. Grunhut*, *supra*, it was held that a British manager of an enemy firm with a branch in London, who was remunerated by a salary and commissions on sales, is not a person interested within the purview of the Trading with the Enemy Act, 1914, for the pur-

pose of applying for a receiver to conduct the affairs of the enemy firm: *Re Gaudig & Blum*, [1915] W.N. 34, 31 T.L.R. 153.

MARRIED WOMEN.—In the case of *De Wahl v. Braune*, 1 H. & N. 178, it was held that a *femme covert* could not sue alone on a contract made with her before or after marriage, though her husband was an alien enemy.

But in *Thurn & Taxis v. Moffitt*, [1915] 1 Ch. 58, 31 T.L.R. 24, it was held that a woman who is an alien enemy and who claims to be the wife of an alien enemy, and who has registered herself as an alien subject of an enemy state under the Aliens Restriction Act, 1914, is entitled, notwithstanding the state of war existing between this country and her own, to sue in the Courts of this country for the purpose of enforcing an individual right not claimed through her husband.

EXECUTORS AND ADMINISTRATORS.—In *Re Estate of Herman Koenig*, [1915] W. N. 24, the executor, the next-of-kin and chief beneficiaries were alien enemies residing in the enemy country, and on a power of attorney by the executor to a British subject an order was made granting letters of administration with the will annexed. But in *Re Estate of Jacob Schiff*, 59 S.J. 303, it was held, not following the *Koenig case*, *supra*, that where the next-of-kin of a deceased intestate are alien enemies, the Public Trustee is the proper person to take the grant of administration to the estate of the deceased.

Distinguishing the case of *Continental Tyre, etc., v. Daimler Co.*, [1915] 1 K.B. 893, and following *Dumenko v. Swift Can. Co.*, 32 O.L.R. 87, it was held that an action under the Fatal Accidents Act, R.S.O. 1914, ch. 151, brought by an administrator of the estate of a deceased person, cannot be maintained if brought for the benefit of alien enemies, and that if such action is brought after the commencement of the war, it will be dismissed: *Dangler v. Hollinger, etc.*, 23 D.L.R. 384, 34 O.L.R. 78.

ACTIONS.—No action can be maintained either by or in favour of an alien enemy: *Brandon v. Nesbitt*, 6 Term. Rep. 23.

War does not suspend an action against an alien enemy, and he may appear and defend either personally or by counsel: *Robinson & Co. v. Mannheim Continental Ins. Co.*, [1915] 1 K.B. 155, 31 T.L.R. 20.

One is an alien enemy of this country whose sovereign is at enmity with the Crown of England, and one of his disabilities is that he cannot sue in our Courts during war, unless he is here "in protection," the burden of shewing such status being on himself. Therefore, a citizen of a nation at war with this country who institutes a civil action will have his action stayed, unless as a condition precedent to such right he establishes that he is "in protection" in such sense that he is not a person professing himself hostile to this country nor in a state of war against it: *Bassi v. Sullivan*, 18 D.L.R. 452, 32 O.L.R. 14.

Thus it was held, that an alien enemy cannot, by the municipal law of this country, sue for the recovery of a right claimed to be acquired by him in actual war: *Anthon v. Fisher*, 2 Doug. 649n.

In *Ricord v. Bettenham*, 3 Burr. 1734, 1 W.Bl. 563, it was held, that an action was maintainable by an alien enemy upon a ransom bill, even when the hostage given died in prison.

In *Maria v. Hall*, 1 Taunt. 32, the right of action of a prisoner of war for work and labour carried on under the protection of the commander of the British forces was upheld.

Following the case of *Topay v. Crows Nest, etc.*, 18 D.L.R. 784, but disapproving *Bassi v. Sullivan*, 18 D.L.R. 452, it was held, that a person of German or Austro-Hungarian nationality, domiciled in Canada, as to whom there is no reasonable ground for believing that he is engaged in hostile acts or in contravening the law, may, by virtue of the Orders-in-Council (Can.) of August 7 and 15, 1914, maintain an action for negligence against his employer for personal injuries sustained in following his avocation where such action would lie were his country not at war with Great Britain; and that the onus is not upon the alien to prove, on the defendant's motion to stay proceedings in an action brought before war was declared, that he had not contravened the restrictions specified in the Royal Proclamations: *Pescovitch v. Western Can. Flour*, 18 D.L.R. 786, 24 Man. L.R. 783.

As to right of subject of nation at war with Great Britain to bring an action for damages, see *Oskey v. City of Kingston*, 20 D.L.R. 959, 31 O.L.R. 190. It was there held, that a workman's widow and children, although of a nation with which Great Britain is at war, so long as they reside in the province and do not contravene the regulations contained in the Proclamations, are entitled, notwithstanding their status as alien enemies, to proceed with their action instituted before the declaration of war, seeking to recover damages under Lord Campbell's Act.

In *Dame Mathilda Johansdotter v. C.P.R. Co.*, 47 Que. S.C. 76, it was held, that the absence of a dependant or beneficiary in a foreign country is a justification for not filing a claim within the delay fixed by the Workmen's Compensation Act.

The plaintiffs, subjects of Austria and residing in that country, began their action before the outbreak of war with Great Britain and were ordered to give security for costs. Their solicitor, not being able to communicate with them after the war began, and no further proceedings having been taken, applied for an extension of time and for a stay of proceedings, in order to avoid the dismissal of the action which follows upon failure to give security, and which was refused. It was held, following *Brandon v. Nesbitt*, 6 T.R. 23, and *Le Bret v. Papillon*, 4 East 502, that the plaintiffs having become alien enemies, are barred from further proceedings, and the action must be dismissed, but that the dismissal will not be a bar to a subsequent action after the termination of the war: *Dumenko v. Swift Can. Co.*, 32 O.L.R. 87.

APPEALS.—An alien enemy, unless with special license or authorization of the Crown, has no right to sue during the war, his right being suspended during the progress of hostilities and until after the restoration of peace. He may, however, be sued during the war in the King's Courts, and he may appear to be heard in his defence. He has the same right of appeal as any other defendant, but, if he be a plaintiff, his right of appeal is suspended until after the restoration of peace: *Porter v. Freudenberg, C.A.*, [1915] W.N. 43, 31 T.L.R. 162.

In an appeal by an alien enemy, who was the registered owner of a patent, from an order for the revocation of the patent, it was held, that the appellant must be regarded as in the same position as a defendant who appeals from a judgment given against him, and that, accordingly, the appellants were entitled to appear and to be heard on the motion and to have the appeal heard in the ordinary course, and that the hearing of the appeal should not be suspended during the war: *Re Merten's Patent*, [1915] W.N. 48, 32 R.P.C. 109.

An appeal in an action for the infringement of patent prosecuted by a domestic company and an enemy corporation of whom the patent had been claimed by assignment, the Court will not strike out the enemy corporation as co-plaintiff where the action could not otherwise be proceeded with separately, particularly where there is no request to that effect by the co-plaintiff, but will suspend the proceedings until after the termination of the war: *Actien-Gesellschaft, etc., v. Levinstein, Ltd.* (1915), 50 L.J. 105, 31 T.L.R. 225.

PLEADING.—In a plea of alienage, the defendant must state that the plaintiff was born in a foreign country, at enmity with this country, and that he came here without letters of safe conduct from the King: *Casseres v. Bell*, 8 Term. Rep. 166.

A plea that the plaintiff was an alien enemy residing in the country without the license, safe conduct, or permission of the Sovereign is good, although it does not expressly negative a certificate of the Secretaries of State under 7 & 8 Vict. ch. 66, ss. 6, 8: *Alcenius v. Nygren*, 4 El. & Bl. 217.

A British agent effecting a policy on behalf of alien enemies, who became such after the happening of the loss but before the commencement of the action, is entitled to recover against the underwriter, who had only pleaded the general issue; for such temporary suspension during the war of the assured's right of suit upon a contract, legal at the time, and liable to be enforced upon the return of peace, cannot be taken advantage of under a plea of perpetual bar, there being no legal disability on the plaintiff on the record to sue: *Flindt v. Waters*, 15 East 260.

In an action on a policy of insurance, it is no defence under the general issue that the persons interested, who were neutrals when the policy was effected and the loss happened, had become alien enemies before the action: *Harman v. Kingston*, 3 Camp. 152.

A plea of alienage to an action on a policy, brought in the name of an English agent for his alien principal, whose interest appears on the record, is a good plea; and a replication to such plea, that the alien is indebted to the agent in more money than the value of the property insured, cannot be supported: *Brandon v. Nesbitt*, 6 Term. Rep. 23.

When an alien enemy, at the time of the action brought, became an alien enemy after the plea pleaded, a plea of the defendant that the plaintiff ought not to have or maintain his action because he was before, at the time of exhibiting the bill, and that he now is, an alien enemy, is badly pleaded. But, notwithstanding the imperfection, the Court, if satisfied from the whole record that the plaintiff is in point of fact an alien enemy, it will give judgment accordingly: *LeBret v. Papillon*, 4 East. 502.

COSTS.—If the plaintiff is domiciled in a country in a state of war with England, he cannot, so long as that state of war lasts, be required to furnish security; but the Court must suspend all proceedings in the case until peace is restored: *Re Rozarijout v. B. & A. Asbestos Co.*, 16 Que. P.R. 213.

It was questioned, in the case of *Robinson & Co. v. Mannheim Continental Ins. Co.*, [1915] 1 K.B. 155, 31 T.L.R. 20, whether, if an alien enemy is successful, he is entitled to an order for the payment of costs. In the judgment, Bailhache, J., remarked: "I mention this point now because, in considering my judgment, it occurred to me as a possible difficulty in the way of allowing the action to proceed. I think, however, the difficulty, if it arises, is sufficiently met by suspending the defendant's right to issue execution."

ARBITRATION.—In the case of *Smith, etc., v. Becker, etc.*, 31 T.L.R. 59, the right of an alien enemy to proceed with an arbitration under the arbitration clauses in a contract made before the outbreak of the war was upheld.

NATURALIZATION.—According to the principles of public international law recognized in England in time of war, the subjects are enemies as are the states, "*jus standi in judicio*"; but if the subjects of a belligerent state are allowed to remain in this country, they are relieved from their disabilities. The proclamation of August 15, 1914, which confirmed to the Germans and Austro-Hungarians residing in Canada the enjoyment of all rights which the law had accorded them in the past, upon condition of their good conduct, is in conformity with art. 23b of the Hague Conference, and, consequently, such aliens who live in this country during the war preserve their civil rights, and particularly that of applying for naturalization: *Re Herzfeld*, 46 Que. S.C. 281.

The *Herzfeld* case, *supra*, was not followed in *Re Cimonian*, 23 D.L.R. ante, 34 O.L.R. 129, and it was held, following *King v. Lynch*, [1903] 1 K.B. 444, and *Porter v. Freudenberg*, [1915] 1 K.B. 857, that an alien enemy has no right to naturalization, and his application therefor will be dismissed by the Court of its own initiative.

ARREST AND DETENTION.—In performing the duty of arresting and detaining persons of a nationality at war with Great Britain who attempt to leave Canada, and in regard to whom there is reasonable ground to believe that their attempted departure is with a view of assisting the enemy, a wide discretion is left to the military commanding officers, which will not ordinarily be reviewed or interfered with by the Courts under a *habeas corpus* process: *Re Chamryk*, 19 D.L.R. 236, 25 Man. L.R. 50.

Province of Nova Scotia.

SUPREME COURT.

Drysedale, J.]

[October 22, 1915.]

REX v. HENRY, ALIAS REID.

Prisoner in custody awaiting sentence—Practice on other pending criminal charges against her.

The defendant was convicted on October 19th, 1915, on summary trial by the Stipendiary Magistrate of the City of Halifax for uttering a forged cheque and remanded to jail at Halifax till November 16th, 1915, to be then brought up for sentence. The Deputy Sheriff had sworn out a warrant to arrest, issued and dated September 13th, 1915, against the defendant for uttering another forged cheque. A material witness for the prosecution was about to leave the Province. On the above facts an application was made ex parte under Nova Scotia Crown Rule 157, on October 22nd, 1915, for a writ of habeas corpus ad respondendum to bring the prisoner before a justice for preliminary examination.

Held, following *Ex p. Griffiths*, 5 B. & A. 730, and the practice as laid down in Archbold's Crown Practice (1884), pp. 347-8, that the writ should be granted as asked for.

Power, K.C., for the prosecutor, for the motion.

[NOTE.—The prisoner was brought before the Justice and after preliminary examination was committed for trial.]

Book Reviews.

The Principles of Bankruptcy. Embodying the Bankruptcy Act together with the unrepealed sections of previous Acts. By RICHARD RINGWOOD, M.A., 12th edition. London: Stevens & Haynes, Temple Bar. 1915.

Mr. Ringwood is well known to the profession as the author of "Outlines of the law of Torts" and "Outlines of Banking Law."

The book before us, being now in its 12th edition, is so well known as not to need any detailed reference to its contents. But it may be said generally that it covers all legislation in England

touching insolvency, bills of sale, deeds of arrangements, bankruptcy rules, etc., and also refers to the leading cases on bankruptcy and bills of sale. Its value in this country would be very considerable if we had, as we hope to have "when this cruel war is over" a well considered bankruptcy law for the whole Dominion.

Illustrations in Advocacy. By RICHARD HARRIS, K.C. 5th edition, with a foreword by George Elliott, K.C. London: Stevens & Haynes, Bell Yard. 1915.

The author, amongst other interesting information, gives an analysis of the speeches of Mr. Hawkins, K.C. (Lord Brampton), in the Titchborne prosecution for perjury. Perhaps the most instructive part of these short but suggestive studies in advocacy is the analysis above referred to. It recalls to one's memory that historical trial which put the finishing touch to the reputation of Mr. Hawkins, whose masterly cross-examination of the claimant exposed the fraud which the prisoner endeavoured to perpetrate. If space permitted we would gladly give numerous extracts from these amusing as well as helpful illustrations; but the best thing our readers can do is to buy the book and keep it on hand to wile away the present tedious hours until business revives, hoping for something more arduous and lucrative in the near future.

Notes on the Remedies of Vendors and Purchasers of Real Estate.

With special reference to Instalment-plan Agreements, Rescission, Determination and Relief against Forfeiture. Second edition. By C. C. McCaul, B.A., K.C., of Osgoode Hall, and of the Bars of Alberta, Saskatchewan, and British Columbia. Toronto: The Carswell Company, Limited, 1915. London: Sweet & Maxwell, Limited.

The first edition of this interesting and useful book was published in 1910 and was so well received by the profession that a second edition has been called for. The book before us brings down the cases to the date of publication. The work is eminently practical as may be seen from the Table of Contents: Chap. I. Introductory; II. Vendor's Remedies—Contract affirmed, covering actions for purchase money and damages, to enforce vendor's liens, specific performance, etc.; III. Vendor's remedies—Con-

tract disaffirmed, covering rescission and re-sale; IV. Vendor's remedies—Special stipulations, covering a number of miscellaneous subjects. V. Determination apart from special stipulation. VI. Purchaser's remedies, explanatory of and giving further details as to the information given in chapters II. and III.; VII. Notice—Waiver—Delay; VIII. Election of remedies.

In the citation of cases the author gives generally, as far as possible, the words of the court in reference to the point under discussion. The style of the author is clear and concise. The book is specially useful as it collects the law as to and deals with various matters not easily found without much research.

Bench and Bar.

JUDICIAL APPOINTMENTS.

Cornelius Arthur Masten, of the City of Toronto, in the Province of Ontario, K.C., to be a Judge of the Supreme Court of Ontario and a member of the High Court Division of the said Court and ex-officio a member of the Appellate Division of the said Court, vice Mr. Justice Teetzel, who has resigned the said office. (Oct. 30.)

MR. JUSTICE MASTEN.

The vacancy in the Supreme Court of Ontario, caused by the retirement of Hon. Mr. Justice Teetzel through ill health, has been filled by the appointment of Mr. Cornelius A. Masten, K.C.

Mr. Masten was born at Lacolle, in the Province of Quebec, and was called to the Bar in the year 1881 and received silk in 1908. He was appointed a Bencher of the Law Society of Upper Canada at the last election, and practised law in Toronto for thirty-four years, first in partnership in the firm of Watson, Smoke and Masten and subsequently in the firm of Masten, Starr and Spence. Mr. Masten was well and favourably known as a barrister outside his own city and carried on a substantial law practice up to the time of his appointment. On Monday, November 1st, at the Non-jury Sittings, he received the congratulations of the Ontario Bar. We hear on all sides that Mr. Justice Masten is able, learned, impartial, amiable and dignified. It is safe to predict he will be a useful Judge and persona grata to the Bar.

THE CANADIAN BAR ASSOCIATION.

A meeting of the Ontario Executive of the Canadian Bar Association was held at the office of the Associate-Secretary on October 15th ultimo. There were present: E. F. B. Johnston, K.C., Vice-President; M. H. Ludwig, K.C.; N. B. Gash, K.C.; F. M. Field, K.C.; C. A. Moss, Esq.; and W. J. McWhinney, K.C., Associate Secretary.

Mr. Nichol Jeffrey of Guelph, a member of the Association, was elected to serve on the above committee to fill the vacancy caused by the death of the late Mr. J. J. Drew, K.C., of Guelph.

Mr. Ludwig, convener of the sub-committee appointed to consider the question of the uniformity of Insurance Laws, reported that he had given the subject considerable study, but found it was so vast that he felt the members of the Committee could not give the necessary time to do the preliminary work necessary to enable them to make the first report thereon. He accordingly suggested that some competent member who could afford the time, should be employed and paid to do the preliminary work; and this being done, the sub-committee would give all necessary assistance to the member so employed. No action was taken on this report.

SITTINGS OF THE COURTS.

Ontario.—Mr. Justice Masten has announced his intention of holding the Weekly Court, when he is sitting, at half past ten a.m., instead of the ordinary hour of 11 a.m. Chief Justice Falconbridge sits at 10 a.m.; at present no other judge, that we are aware of, has decided to sit at any other hour than 11. It would, of course, be within the verge of possibility that each judge should select a different hour for commencing business. At the same time it is quite obvious that such a course would be very inconvenient to the profession, who often have no means of knowing until the court opens which judge is going to sit. Besides, it must be remembered that the officers who attend the sittings of the court are also the officers deputed to countersign cheques, and the hour before the opening of the court is the only time they may be able to devote to that purpose, and if that hour is taken away it means that the business of the accountant's office will be more or less blocked. The plan of judges selecting different hours for sitting is to be deprecated. If the judges who desire to commence business at an earlier

hour than 11 a.m. cannot persuade the rest of their brethren to conform to their wishes, so that there may be a uniform rule, then it does not seem too much to suggest that the minority in this, as in other matters, should conform to the practice of the majority and not seek to be a "law unto themselves."

War Notes.

MESSAGE FROM THE KING.

The following is the message from His Majesty The King calling for more men to fight the battles of the Empire:—

"To My People.—At this grave moment in the struggle between my people and a highly organized enemy who has transgressed the laws of nations and changed the ordinance that binds civilized Europe together, I appeal to you.

"I rejoice in my Empire's effort and I feel pride in the voluntary response from my subjects all over the world who have sacrificed home and fortune and life itself in order that another may not inherit the free Empire which their ancestors and mine have built.

"I ask you to make good these sacrifices. The end is not in sight. More men and yet more are wanted to keep my armies in the field and through them to secure victory and enduring peace. In ancient days the darkest moment has ever produced in men of our race the sternest resolve. I ask you men of all classes to come forward voluntarily and take your share in the fight. In freely responding to my appeal you will be giving your support to our brothers who for long months have nobly upheld Britain's past traditions and the glory of her arms.

"GEORGE, R.I."

This appeal must surely stir the hearts even of "slackers." Some of these are "degenerates" and are not wanted. Others are not, and still hold back. If the King's call does not stir them, perhaps a perusal of the account of the dastardly murder of the heroic nurse, Miss Cavell, might breed indignation and a desire to punish her German butchers. Loyalty and righteous anger should be strong incentives.

War was declared by Great Britain against Bulgaria from October 15th, at 10 o'clock p.m.

There has been a warm and hearty response to the appeal of the English Red Cross referred to in the Royal Proclamation (ante p. 421). As the returns are not all in, the amount cannot be stated definitely, but at present it is considerably in excess of one and half million dollars. It will probably be increased to two millions, or more.

Another member of the Bar takes command of a regiment. Captain Arthur Clement Machin of Kenora, will be the Lieut.-Colonel of the new regiment composed of units from Port Arthur, Kenora, Fort William and Rainy River regions. It is an excellent appointment. Captain Machin was at one time in the South African Constabulary and took part in the war in South Africa.

The following extract from an article of Sir Frederick Pollock, in the "United Empire Journal," is worth noting at the present time:—

"The present war has so marvellously consolidated the Empire that it is sometimes difficult for those whose memory does not carry them back beyond a couple of decades or so to realise how slender was the bond, and how few the common interests, at a time within fairly recent memory. It was only in 1887 that the first Imperial (then designated Colonial) Conference was held, and it did little more than express a pious hope for closer Imperial relations. An advance was made in 1898, by the establishment of Imperial Penny Postage, towards greater communication between all parts of the Empire and hence greater knowledge. But it required the Boer War to bring to the average individualistic Briton the realisation of Imperial co-partnership. It was during the dark days of the Boer War that the League of the Empire came into being. It was felt that the linking together of the children of the Empire would do something towards maintaining its future stability, and the Comrade Correspondence Branch was formed, a tiny but unbreakable strand in the web of Empire, and one destined to exercise a strong and ever-growing influence."

Flotsam and Jetsam.

Lord Halsbury, who long ago earned the title of the "Grand Old Man" of the Law, will complete his ninetieth year on Friday, having been born on September 3, 1825. Every member

of the profession, proud of his extraordinary record of unabated vigour, will cordially wish him many happy returns of the day. It is sixty-five years since he began his distinguished career at the Bar, and thirty years since he began his unusually long tenure of the Woolsack. So sure has been his possession of the secret of perennial youth that, notwithstanding his approach to the nonagenarian stage, he has remained one of the youngest men in the profession. When ten years ago, Mr. Choate was entertained by the Bench and Bar of England on his retirement from the office of American Ambassador, he made a very felicitous allusion to the irrepressible vitality of Lord Halsbury, who, as chairman of the gathering, had proposed his health. Quoting the familiar lines, "time, like an ever-rolling stream, bears all its sons away," Mr. Choate observed: "But the Lord Chancellor seems to stem the tide of time. Instead of retreating like the rest of us before its advancing waves, that happily he is actually working his way up stream" is scarcely less true to-day than it was ten years ago. Two other Chancellors of the Victorian era lived to be nonagenarians; Lord Lyndhurst was ninety-one when he passed away, and Lord St. Leonards reached the age of ninety-three. The "Lyndhurst of our day," as Sir Edward Clarke has aptly called him, continues to display a mental and physical vigour which encourages the hope that his years will exceed those of any of his predecessors.—*Law Journal*.

John Doe, having taken a recent bar examination, was asked by his friend Richard Roe, how he came out, to which Doe replied: "Well, I wrote Little on Mortgages and Trust Deeds, Moore on Facts, and Long on Domestic Relations. I Fell on Guaranty and Suretyship and was Fuld on Police Administration, but Keener on Corporations. I got Wise on American Citizenship, but was Poor on Referees under the Code System. My Spelling on Trusts and Monopolies ranked me High on Injunctions and May on Insurance. I took a Knapp on Partition, was Tarde on Penal Philosophy, but started the Ball on National Banks and did my Best on Evidence. I was Hale on Torts, turned Gray on the Rule against Perpetuities, got Dropsie on Roman law of Testaments and pulled through by a Hare on Contracts."—*Case and Comment*.

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ACTIONS BY ALIEN ENEMIES.

In Halsbury's Laws of England it is said: "An alien enemy had no rights at all at common law: he could be seized and imprisoned, and could have no advantage of the law of England, nor obtain redress for any wrong done to him": vol. i. 310: see *Sylvester's Case* (1702), 7 Mod. 150; and it is said in Dyer 26 that "An alien enemy shall have no benefit of the King's laws." This, though merely a dictum, agrees with what is said in Comyn's Dig. Abatement (E. 4): "Alien enemy is a plea in abatement Co. Lit. 129*b*, Art. Ent. 11, 9 E. 4, 7, or to the action, Co. Lit. 129*b* in actions, real, personal, or mixed, and though the suit is in another right as executor: R. Cro. Eliz. 142. So alien enemy in the testator at the time of his death is a plea to an action by his executor on an obligation: Semb. Lut. 34; Skin. 370."

"An alien enemy cannot have any action, real personal or mixt: Dy. 2*b*; 19 Ed. 4, 6; Q. 1 Rol. 195*b*; Semb. Ow. 45*n*": Com. Dig. Alien *c* (5).

In the *Doctrina Placitandi*, a work of an anonymous King's Sergeant (said to be Sampson Ever), published with the imprimatur of Lord Chancellor North, in 1677, and said to have been highly approved by no less a legal luminary than Chief Justice Willes, it is said: "If an alien bring a personal action, or a mixed one in his own right, the defendant can plead in abatement in disability of the person, or in bar of the action, with this difference that in action personal or trespass of his house, the defendant ought to aver that the plaintiff is an alien, born of such a place, under the allegiance of such a prince, that is an enemy to our Lord the King, for an alien friend may traffic, and have a house for habitation, therefore may have a personal action, and for his house broken (as also he may have a writ of error for

necessity), and the opinion of Lord Coke, in his Com. Sur. Lit., p. 130 b, is that if any alien friend bring action, that ought to be pleaded in disability of the person and not of the writ. *But if he be an alien enemy the defendant may conclude to the action:* Doct. Placit. 9. We have italicized the last words, from them it appears that, according to Lord Coke and the author of the Doct. Placit., the plea of alien enemy is not a mere dilatory plea, but a plea in bar of the action.

In Bacon's Ab.—Tit. Abatement N. it is also laid down that "Alienage can only be pleaded in abatement to an alien in league, *but may be pleaded in bar to an alien enemy, because the cause of action is forfeited to the King as a reprisal for the damage committed by the dominion in enmity.*" And in Rolles' Ab. 195 it is said, "Le Roy ces avera": 19 E. 4, 6. But the note in Rolles is followed by "Mes quære," and in the annotation to Bacon's Abridgement, Aliens (E), note a, it is said: "Where the plaintiff is an alien enemy at the time of the cause of action arising, this may be given in evidence on the general issue, *or pleaded in bar*; but when he became so subsequently to the accruing of the cause of action it only goes to his disability to sue and must be pleaded in abatement: Doug. 649, note 132; 6 Term. R. 24; 15 East 260; 3 Camp. 152; and it is said: "The plea of alien enemy is a bar to a bill for relief in equity, as well to an action at law" Bacon's Abridg. Aliens (D.) 183.

The reason for the above distinction would appear to be this, that, where the plaintiff is an alien enemy at the time of the alleged cause of action arising, he is in fact unable to acquire any right, and therefore the defence of alien enemy is a bar, but where he becomes so subsequently according to modern law his right of action is merely suspended because "On the restoration of peace, one lately an enemy may sue for rights acquired when in amity": 6 T.R. 28, 1 Taunt. 29. And in bankruptcy, therefore, an alien enemy will be admitted, reserving the dividend: 13 Ves. 71." Com. Dig. Alien (C) 5 note. The case referred to in Vesey is *Re Boussmaker* 13 Ves. 71. That was an application by an alien enemy to be admitted to prove a debt in bankruptcy. Percival, in arguing, said: "But clearly

other creditors ought not to be permitted to take the dividends accruing upon this debt; for the Crown will be entitled;" and see 19 E. 4, 6, where it is said by Brian, though a debt be void against the party, the King shall have it; and Lord Eldon, in giving judgment, remarks: "If this had been a debt arising from a contract with an alien enemy, it could not possibly stand; for the contract would be void. But if the two nations were at peace at the date of the contract, from the time of war taking place the creditor could not sue; and the contract being originally good, upon the return of peace the right would survive. It would be contrary to justice, therefore, to confiscate the dividend. Though the right to recover is suspended, there is no reason why the fund should be divided among the creditors." His judgment, therefore, was, "Let the claim be entered; and the dividend be reserved."

In *Rex v. Depardo*, 1 Taunt. 28, it was said by Lord Mansfield, C.J.: "If the Crown did not enforce a contract to which an alien enemy was entitled, the prisoner (an alien enemy) might enforce it after the conclusion of a peace." There is also a dictum of Lord Ellenborough, in *Harmer v. Kingston*, 3 Camp. 153, that where persons interested in the subject of an action become alien enemies, "that only goes to suspend the remedy." So also Story says: "The rights of an alien to sue in the Courts of a foreign country upon a contract made during peace, are suspended during war, but they revive upon the recurrence of peace": Story Con. Laws, s. 19, citing *Houriet v. Morris*, 3 Camp. 303, but the case does not seem to bear out the text.

It is possible that the statements above quoted may be harmonized in this way, viz., that, where the cause of action is alleged to have arisen after a state of war existed, in that case the objection of alien enemy is a bar to the action; but where it arose before war, then the objection is in abatement and in the nature of a dilatory plea, the right of action being merely suspended during the continuance of the war.

But if the true principle why an alien enemy cannot sue in the King's Courts is because his rights are forfeited to the Crown, as stated in Bacon's Ab., *supra*, then, as the forfeiture would

attach to all rights of property which the alien had acquired before hostilities commenced, and after hostilities he is incapable of acquiring any rights, from this it necessarily follows that the plea of alien enemy would in all cases be in bar of the action and not merely in abatement; but it seems that, according to modern opinion, the declaration or existence of a state of war does not *ipso facto* have the effect of vesting in the Crown all the property and rights of action in respect of property of alien enemies, but under the common law as modified by international law, although the Crown has now, as it always had, a right to confiscate the property of alien enemies within its territories, yet, except as regards ships and their cargoes, this is a right that is now rarely exercised by belligerents, and it would now seem that, unless some overt act of confiscation actually takes place, the rights of action of the alien enemy owner as to any property acquired before war are merely suspended and will revive on the restoration of peace.

That the right of confiscation of the property of alien enemies still exists, however, is admitted by modern writers on international law. In the latest edition of Hall on International Law, we find it stated that:—

“Property belonging to an enemy which is found by a belligerent within his own jurisdiction, except property entering territorial waters after the commencement of war, may be said to enjoy a practical immunity from confiscation; but its different kinds are not protected by customs of equal authority, and, although seizure would always now be looked upon with extreme disfavour, *it would be unsafe to declare that it is not generally within the bare rights of war*”: Hall's International Law (6th ed.), p. 431.

Money loaned to a belligerent state by an enemy and the interest thereon are said to be exempt from confiscation: *Ib.* 430. But the author goes on to say: “Real property, merchandise and other moveables and incorporeal property, other than debts due by the state itself, stand in a less favorable position. Although not appropriated under the usual modern practice, *they are probably not the subjects of a thoroughly authoritative custom of exemption*”: *Ib.* 432. The author goes on further

to observe: "During the eighteenth century the complete appropriation of real property disappeared, but its revenues continue to be taken, or at least to be sequestered; and property of other kinds was sometimes sequestered and sometimes definitely seized": *Ib.* 433. *This right of sequestering the private property of enemies was asserted by an act of Congress of the Confederate States in 1861, but Lord Russell remarked that, "Whatever may have been the abstract rule of the Law of Nations in former times, the instances of its application in the manner contemplated in the Act of the Confederate Congress in modern and more civilized times are so rare and have been so generally condemned, that it may be said to have become obsolete": *Ib.* 434.

This writer, therefore, concludes: "Upon the whole, although subject to the qualification made in reference to territorial waters, the seizure by a belligerent of property within his jurisdiction would be entirely opposed to the drift of modern opinion and practice, the contrary usage, so far as personal property is concerned, was, until lately, too partial in its application, and has covered a larger field for too short a time to enable appropriation to be forbidden on the ground of custom, as a matter of strict Law; and as it is sanctioned by the general legal rule, a special immunity can be established by custom alone. For the present, therefore, it cannot be said that a belligerent does a distinctly illegal act in confiscating such personal property of his enemies existing within his jurisdiction as is not secured upon the public faith; but the absence of confiscation in the more recent European Wars, no less than the common interest of all nations, and present feeling, warrant a confident hope that the dying right will never again be put in force, and that it will soon be wholly extinguished by disuse": *Ib.* 435. See also Wheaton International Law, s. 303 *et seq.*; Woolsey International Law, s. 124.

These writers all concede that the right of confiscation exists, but Hall and Wheaton both express the opinion that it will not be exercised; but before it can be positively affirmed that the

*It has been recently said in the public press that it is the intention of the Italian Government to confiscate a number of German vessels interned in Italian ports prior to the outbreak of the present war.

right of confiscation of the property of an alien enemy does not now exist at Law, some statute would be necessary to relieve alien enemies from the penalties and disabilities which the Common Law imposed on them, and we are not aware of any statute which does so.

It would, therefore, seem that, as a matter of strict law, all the property, and rights of action in respect of property, of alien enemies within the King's Dominions, are liable to forfeiture, subject to the modification of International law, that if the forfeiture is not actually enforced, on the restoration of peace, the alien's rights will revive.

If this be the legal aspect of the matter, it would seem to rest entirely with the executive of a nation whether or not the forfeiture of enemy's property shall, or shall not, be exacted, and it, therefore, may be open to question whether the judiciary can properly assume as a matter of course that such forfeiture will, in any case, much less in all cases, be waived.

This seems to have an important bearing on the proper course to be pursued where the objection of alien enemy is set up as a bar to the further prosecution of an action. Such an objection, as we have seen from what was said *In re Boussmaker, supra*, is not intended to benefit third parties or the defendant in the action. It was really originally founded on the fact that the right had become vested in the Crown, and even now the Crown is interested, and entitled, if it sees fit, to possess itself of the alien enemy's rights. The question of what the Courts should do in the case of an objection of alien enemy being raised does not, therefore, appear to be a private question concerning merely the parties to the action; and it does not seem proper, in such circumstances, that the question should be dealt with, without notice to the Crown. It is for the Crown to say whether it will, or will not, exact a forfeiture; and that is a matter a Court of Law cannot deal with. Moreover, it is proper that the Crown should be informed of the cause of action in order that it may determine whether or not it is willing that the action should proceed. The action of the Crown would probably be governed more or less by what is done by the enemy's government in

regard to like cases where British subjects are concerned: see Wheaton's International Law, s. 301; but, in order that the government may have a free hand, it seems desirable that the judiciary should refrain from assuming that the Crown will, or will not, take any particular line of action, and on all such applications should require the Crown to be notified. Under the former practice at law there might have been some technical difficulty in the way of doing this, but under our present system of procedure there seems to be none.

By attainder all the personal property and rights of action in respect of property accruing to the party attainted, either before, or after, attainder, are vested in the Crown without office found, and, therefore, attainder may be pleaded in bar to an action on a bill of exchange, but not in respect of a claim for uncertain damages: *Bullock & Dodson*, 2 B. & A. 258; and the same rule would seem applicable in the case of an alien enemy, except in so far as the rule has been, or may hereafter be, modified by statute, or International law.

In a recent case in Ontario, of *Luczycki v. Spanish River Pulp Co.*, 9 O.W.N. 136, which was an action by an alien enemy to recover damages for tort alleged to have been committed before the present war commenced, the learned Chancellor held that the action ought not to be dismissed because the right of action was merely suspended by reason of the war, and, therefore, the objection of alien enemy was in that case in the nature of a merely dilatory plea, and not a bar to the action. This ruling appears to accord with what is said in Bacon's Abridgmt. and Comyn's Dig., *supra*; but where the action is for unliquidated damages it might probably sometimes be more in the interest of the Crown that the action should be allowed to proceed. The payment of any judgment recovered in the action would, by the statutes, and Orders in Council, be suspended during the war, and it would be open to the Crown, if it should see fit, to confiscate the judgment; whereas, if the action is suspended till after the conclusion of peace, this right of confiscation would be lost.

From what has been said, we conclude that where an action

by an alien enemy is based on a cause of action alleged to have accrued after the war began, the objection was, and still is, a bar to the action. As to torts committed against an alien enemy or contracts made with him after hostilities began, the alien enemy, as we have seen, is entitled to no redress, and the objection is a bar to the action. But as to all rights of action, whether in contract or tort, which accrued before war, the objection of an alien enemy is only in the nature of a dilatory plea, and not a bar; and the right of action, therefore, is merely suspended by the war, unless the Crown shall see fit to exercise its right of confiscation.

If an action by an alien enemy were allowed to proceed, it would be subject, like any other action, to be dismissed for want of prosecution, if not carried to trial in due course. If dismissed for want of prosecution, the dismissal would not be a bar to another action for the same cause, but the Statute of Limitations might run in the meantime so as to bar any further action.

If the Crown definitely waives its right in respect of a forfeitable cause of action, there does not seem any good ground why the action should not be allowed to be prosecuted notwithstanding the war; and it would also seem reasonable that if the Crown did not choose to waive its rights, an action should be allowed nevertheless to proceed, and in case judgment should be recovered by the alien enemy, the amount might very properly be ordered to be paid into Court to abide the pleasure of the Crown.

THE ENFORCEMENT OF INTERNATIONAL LAW.

The impotence of international law arises from the fact that it lacks some coercive power behind it to meet out due punishment to those who wilfully violate it. And it must be perfectly clear to anyone that international law becomes a mere farce if those who have agreed to be bound by it may with impunity, nevertheless, if it suits them, wholly disregard it, when the time for carrying it out arrives. It is, therefore, an obvious fact that, in order to make international law a real and living rule of conduct, some means must be devised whereby punish-

ment may be adequately administered to those who undertake to counsel, or aid in, its violation. At the same time it must be recognized that a whole nation cannot very well be brought to judgment any more than you can hang a whole mob engaged in a riot. In such a case as you cannot bring all who have been engaged in it to the bar of justice, the ringleaders are selected, and they have to bear in their own persons the punishment for the crimes which they have incited.

The knowledge that this penalty awaits riotous proceedings has a wholesome deterrent effect, and in the same way the existence of a court for the trial of the violators of international law would have the like effect. If sovereigns, statesmen, and military leaders, placed their necks in jeopardy whenever they counselled the violation of international law, they would be slow to incur the penalty which might possibly overtake them; an ambitious monarch, statesman, admiral, or general, would not look forward to the possibility of being hanged as a desirable termination of his career. Such tribunals have, it is true, never before been known in history, and yet, if the cause of law and order is to be advanced in the world, the necessity for such a tribunal seems imperative, for it is plain that it is only by giving to international law a coercive effect that it can be made a reality.

In the present war, at its very beginning, we had the frank admission of the leading statesman of Germany that that country was about to do, what it recognized to be, a wrongful act. Everything done, therefore, in furtherance of that wrongful act was also itself wrongful. Every person killed in defence of his country thus wronged was murdered, every outrage committed was a felonious act and a violation both of international law and the civil law of the aggrieved nation.

What, therefore, more just and fitting than, at the conclusion of this war, that the Emperor of Germany, his general staff and chancellor by whom all this abominable wickedness was designed and under whose authority it was carried out should be handed over to an International Court to be convened for the occasion and tried for their lives as international criminals. It might be said that for the breach of international law no penalty has ever been prescribed, and to impose a penalty after the com-

mission of the offence would be, in effect, seeking to punish the guilty by *ex post facto* law. But such an objection would not be reasonably tenable. It is not necessary to the validity of any law that those who violate it should have a warning as to the precise measure of punishment they are liable to incur for their offence, and, though it is usual in the enactment of criminal laws to lay down some indication of the nature of the punishment to be inflicted on offenders, it is by no means necessary on any legal or moral ground that that should be done. Breaches of international law may involve various degrees of injury or guilt. For some a money compensation may be adequate, but for others death itself would be entirely inadequate. No doubt nations would do their utmost to protect their rulers from the consequences, and it might not always be feasible to execute the judgments of an International Court unless the criminals were in hand; and it will always, therefore, be a necessary preliminary to any effective administration of international law that offenders should either submit or be compelled in some way or other to submit, to the jurisdiction of the Court. Ordinarily this could only be done by the seizure of their persons.

It is almost needless to say that the hanging of a crowned head and his advisers found guilty of sanctioning flagrant violations of international law would do more to make that law a reality than any Hague Conference that ever has been or ever could be held. We confess, however, that we have not much hope that our suggestion will be put into practical operation. Proverbs about "catching your hare," etc., and "putting salt on a bird's tail," etc., naturally occur to one's mind. But, by pacifists of the Hague Conference and by members of the International Conciliation Association, who desire that law should triumph over violence, our proposition ought to be sincerely welcomed and advocated.

IS CHRISTIANITY A PART OF THE LAW?

How are the mighty fallen! A writer in the *Canadian Law Times*, referring to a recent article in this journal entitled "Is Christianity a Part of the Law?" says:—"No authorities for the proposition is (*sic*) to be cited, but for this the writer of the

article is not to be blamed. There are none." This is oracular, but, like many other oracular utterances, not well founded. In vol. 46, page 83, of this journal, are to be found citations from Hyde, J., Raymond, C.J., Kenyon, C.J., Hardwicke, L.C., Patteson, J., Kelly, C.B., and Harrison, C.J., all affirming the proposition that Christianity is a part of the law of the land: and, on page 82, there are citations from Bracton, which can have no other meaning. To describe Bracton and the above array of learned judges as of "no authority" seems to savour of the confidence of youth, but not of matured experience. The writer's *ipse dixit* reminds us of a favourite aphorism of the late Sir John Hagarty: "We are none of us infallible, not even the youngest barrister." Perhaps, in spite of the off-hand judgment of our learned friend, the mighty may survive his criticism.

LAW OFFICERS OF CROWN AS CABINET MINISTERS.

The *Law Times* thus refers to the retirement of the late Attorney-General of England:—"Owing to a disagreement on a question of policy, Sir Edward Carson has retired from the Cabinet. We trust that the precedent created in the case of Lord Reading, and continued in the cases of successive Attorneys-General, will not be resorted to in the future. The proper place for the Law officers of the Crown is outside the Cabinet, and their proper duties are to advise the Government in legal matters. A combination of the positions of Cabinet Minister and Law officer makes for efficiency in neither place, and the opinions of a Law officer would certainly carry more weight when he is advising the Cabinet not as a colleague, but purely and simply as legal adviser. Similar views are expressed in the *Solicitors' Journal*.

It is stated by Todd, writing in 1887, that in England an Attorney-General is never admitted to the Cabinet. Lord Reading, however, more recently, when Attorney-General was made a Cabinet Minister. Since Bacon's time an Attorney-General had not been sworn in as a member of the Privy Council until Sir Robert Finlay was appointed a member of that body.

Mr. Balfour, when speaking on the subject, said:—"The Law officers have no control over the legal action of the Government. A Minister is not obliged to take his law from the Attorney-General, but he goes to Law officers of the Crown because he thinks he will get better advice from them than he would get elsewhere."

MILITARY SERVICE.

THE FREEMAN'S PRIVILEGE.

The following interesting and admirable sketch of a subject much in evidence at the present time, copied by us from the *Morning Post* of August 20th, is from the pen of Professor Hearnshaw:—

The military system of the Anglo-Saxons is based upon universal service, under which is to be understood the duty of every freeman to respond in person to the summons to arms, to equip himself at his own expense, and to support himself at his own charge during the campaign.

I. Universal Obligation to Serve.

With the words quoted at the head of this article Gneist, the German historian of the English Constitution, begins his account of the early military system of our ancestors. He is, of course, merely stating a matter of common knowledge to all students of Teutonic institutions. What he says of the Anglo-Saxons is equally true of the Franks, the Lombards, the Visigoths, and other kindred peoples. But it is a matter of such fundamental importance that I will venture, even at the risk of tedious repetition, to give three confirmatory quotations from English authorities.

Grose, in his "Military Antiquities," says:—

"By the Saxon laws every freeman of an age capable of bearing arms, and not incapacitated by any bodily infirmity, was in case of a foreign invasion, internal insurrection, or other emergency obliged to join the army."

Freeman, in his "Norman Conquest," speaks of—

"the right and duty of every free Englishman to be ready for the defence of the Commonwealth with arms befitting his own degree in the Commonwealth."

Finally, Stubbs, in his "Constitutional History," clearly states the case in the words:—

"The host was originally the people in arms, the whole free population, whether landowners or dependents, their sons, servants, and tenants. Military service was a personal obligation . . . the obligation of freedom"; and again: "Every man who was in the King's peace was liable to be summoned to the host at the King's call."

There is no ambiguity or uncertainty about these pronouncements. The old English "fyrd," or militia, was the nation in arms. The obligation to serve was a personal one. It had no relation to the possession of land; in fact it dated back to an age in which the folk was still migratory and without a fixed territory at all. It was incumbent upon all able-bodied males between the ages of sixteen and sixty. Failure to obey the summons was punished by a heavy fine known as "fyrdwite."

There is another point of prime significance. Universal service was, if it were true, an obligation. But it was more: it was *the mark of freedom*. Not to be summoned marked a man as a slave, a serf, or an alien. The famous "Assize of Arms" ends with the words: "Et præcepit rex quod nullus reciperetur ad sacramentum armorum nisi liber homo." A summons was a right quite as much as a duty. The English were a brave and martial race, proud of their ancestral liberty. Not to be called to defend it when it was endangered, not to be allowed to carry arms to maintain the integrity of the fatherland, was a degradation which branded a man as unfree.

II. *The Old English Militia.*

This primitive national militia was not, it must be admitted, a very efficient force. It lacked coherence and training; it was deficient both in arms and in discipline; it could not be kept together for long campaigns. The Kings, therefore, from the first supplemented it by means of a band of personal followers.

a body-guard of professional warriors, mounted, well and uniformly armed, and practised in the art of war. Nevertheless, the main defence of the country rested with the "fyrd." The Danish invasions put it to the severest test and revealed its military defects. It was one of the most notable achievements of Alfred to reorganize and reconstitute it. Thus reformed, with the support of an ever-growing body of King's thegns, it wrought great deeds in the days of Alfred, Edward, and Athelstan, and recovered for England security and peace. In the days of their weaker successors, however, all the forces that England could muster failed to keep out Sweyn and Canute, and, above all, failed to hold the field at Hastings.

The Norman Conquest might have been expected to involve the extinction of the English militia. For feudalism as developed by William I. was strongest on its military side, and William's main force was the levy of his feudal tenants. But quite the contrary happened. The Norman Monarchs and their Angevin successors were, as a matter of fact, mortally afraid of their great feudal tenants, the barons and knights through whom the Conquest had been effected. Hence, as English Kings, they assiduously maintained and fostered Anglo-Saxon institutions, and particularly the "fyrd," which they used as a counterpoise to the feudal levy. They even called upon it for continental service and took it across the Channel to defend their French provinces. Thus in 1073 it fought for William I. in Maine; in 1094 William II. summoned it to Hastings for an expedition into Normandy; in 1102 it aided Henry I. to suppress the formidable revolt of Robert of Belesme, Earl of Shrewsbury; in 1138 it drove back the Scots at the Battle of the Standard; and in 1174 it defeated and captured William the Lion at Alnwick. So valuable, indeed, did it prove to be that Henry II. resolved to place it upon a permanent footing and clearly to define its position. With that view he issued in 1181 his "Assize of Arms."

III. Mediæval Regulations.

Into the details of the "Assize of Arms" it is unnecessary here to enter. Are they not written in every advanced text-book

of English history? Three things, however, are to be noted. *First, that the duty and privilege of military service are still bound up with freedom*; no unfree man is to be admitted to the oath of arms. Secondly, that upon freemen the obligation is still universal: "all burgesses and the whole community of freemen (*tota communa liberorum hominum*) are to provide themselves with doubtleets, iron skullcaps, and lances." Thirdly, that, closely as freedom had during the centuries of feudalism become associated with tenancy of land, the national militia had not been involved in feudal meshes; the obligation of service remained still personal, not territorial.

In 1205 John, fearing an invasion of the Kingdom, called to arms all the militia sworn and equipped under the Assize, i.e., all the freemen of the realm. Short-shrift was to be given to any who disobeyed the summons: "*Qui vero ad summonitionem non venerit habeatur pro capitali inimico domini regis et regni.*" (He who does not come shall be regarded as a capital enemy of the King and Kingdom.) The penalty was to be the peculiarly appropriate one of reduction to perpetual servitude. The disobedient and disloyal subject would ipso facto divest himself of the distinguishing mark of his freedom.

Henry III. in 1233 and 1231 made similar levies. In 1252, in a notable writ for enforcing Watch and Ward and the Assize of Arms, he extended the obligation of service to villans and lowered the age limit to fifteen. Edward I. reaffirmed these new departures in his well-known Statute of Winchester (1285), in which it is enacted that "every man have in his house harness for to keep the peace after the ancient assize, that is to say, every man between fifteen years of age and sixty years." Further, he enlarged the armoury of the militiamen by including among his weapons the axe and the bow.

The long aggressive wars of Edward I. in Wales and Scotland, and the still longer struggles of the fourteenth century in France, could not, of course, be waged by means of the national militia. Even the feudal levy was unsuited to their requirements. They were waged mainly by means of hired professional

armies. Parliament—a new factor in the Constitution—took pains in these circumstances to limit by statute the liabilities of the old national forces. An Act of 1328 decreed that no one should be compelled to go beyond the bounds of his own county, except when necessity or a sudden irruption of foreign foes into the realm required it. Another Act, 1352, provided that the militia should not be compelled to go beyond the realm in any circumstances whatsoever without the consent of Parliament. Both these Acts were confirmed by Henry IV. in 1402. But the old obligation of universal service for home defence remained intact. It was, in fact, enforced by Edward IV. in 1464, when, on his own authority, he ordered the sheriffs to proclaim that “every man from sixteen to sixty be well and defensively arrayed and . . . be ready to attend on His Highness upon a day’s warning in resistance of his enemies and rebels and the defence of this his realm.” This notable incident carries us to the end of the Middle Ages, and shews us the old English principle in vigorous operation.

IV. Tudor and Stuart Developments.

The Wars of the Roses, so fatal to the feudal nobility, left the national militia the only organized force in the country. The Tudor period, it is true, saw the faint foreshadowing of a regular army in Henry VII.’s Yeomen of the Guard, and the nucleus of a volunteer force in the Honourable Artillery Company, established in London under Henry VIII. But these at the time had little military importance, and England remained dependent for her defence throughout the fifteenth century, that age of unprecedented prosperity and glory, upon her militant manhood. Hence the Tudor Monarchs paid great attention to the maintenance and equipment of the militia. The practice (which had grown up in the later Middle Ages) of limiting the normal call to arms to a certain quota of men from each county was revived. If the required numbers were not forthcoming compulsion was employed. Statutes were passed making discipline more rigid. Lords Lieutenant were instituted to take over the

command, with added powers, from the sheriffs. An important Mustering Statute (1557) was enacted, graduating afresh the universal liability to service, and making new provision for weapons and organization. William Harrison, writing in 1587, said:—

“As for able men for service, thanked be God! We are not without good store; for by the musters taken 1574-5 our numbers amounted to 1,172,674, and yet were they not so narrowly taken but that a third part of this like multitude was left unbilled and uncalled.”

This from a population estimated at less than six million all told! Such was the host on which England relied for safety in 1588, if by chance the galleons of Spain should elude the vigilance of Drake and should land Parma's hordes upon our shores. Well might the country feel at ease behind such a fleet and with such a virile race of men to second it.

The Stuarts did not take kindly to the English militia. It was too democratic, too free. James I., in the very first year of his reign, conferred upon its members the seductive but fatal gift of exemption from the burden of providing their own weapons. As he himself took care not to provide them too profusely, the force speedily lost both in efficiency and independence. The Civil War hopelessly divided it, as it did the nation, into hostile factions. The Royalist section was ultimately crushed, while the Parliamentary section was gradually absorbed into that first great standing army which this country ever knew, the New Model of 1645. For fifteen years the people groaned under the dominance of this arbitrary, conscientious, and very expensive force. Then, in 1660, came the Restoration, and with it the disbanding of the New Model and the re-establishment of the militia. The country went wild with joy at the recovery of its freedom. Charles II., however, was bent on securing for his own despotic purposes a standing army. Hence he obtained permission from Parliament to have a permanent body-guard, and he gradually increased its numbers until he had some 6,000 troops regularly under his command. James II. increased them to 15,000, and

by their means tried to overthrow the religion and the liberties of the nation. He was defeated and driven out; but his effort to establish a military depotism made the name of "standing army" stink in the nostrils of the nation. "It is indeed impossible," said one of the leading statesmen of the early eighteenth century, "that the liberties of the people can be preserved in any country where a numerous standing army is kept up." The national militia continued, as of old, to stand for freedom and self-government. The voluntarily enlisted standing army was regarded as the engine and emblem of tyranny.

V. The Last Two Centuries.

The eighteenth century saw a constant struggle on the part of constitutionalists to get rid of the standing army altogether. Army Acts were limited in their operation to a year at a time, and were passed under incessant protest. Grants to maintain the army were similarly restricted. Every interval of peace witnessed the rapid reduction of the regular forces. But the times were adverse. Wars were frequent, and on an ever-increasing scale of magnitude and duration. The standing army had to be maintained, and, indeed, steadily enlarged.

But the militia for home defence was never allowed to become extinct, and it enjoyed an immense popularity. In 1757 it was carefully reorganized by statute. The number of men to be raised was settled, and each district was compelled to provide a certain proportion. The selection was to be made by ballot, to the complete exclusion of the voluntary principle. During the Napoleonic war, when invasion seemed imminent, the militia was several times called out and embodied. In 1806 the principal of universal obligation on which it was based was clearly stated by Castlereagh in the House of Commons. He spoke of "the undoubted prerogative of the Crown to call upon the services of all liege subjects in case of invasion."

At the moment when he spoke, however, the imminent fear of invasion had been removed—removed, indeed, for a century—by Nelson's crowning victory at Trafalgar. From that time forward the military forces of the Crown were required not so

much for the defence of the United Kingdom itself as for the provision of garrisons for the vast Empire which had grown up during the eighteenth century. These Imperial garrisons had necessarily to be drawn from professional troops voluntarily enlisted. Thus the militia declined. An effort was made in 1852 to revive it, and again the underlying principle of compulsion was explicitly recognized. The Militia Act of that year contains the provision:—

“In case it appears to H. M. — that the number of men required . . . cannot be raised by voluntary enlistment . . . or in case of actual invasion or imminent danger thereof, it shall be lawful for H. M. — to order and direct that the number of men so required . . . shall be raised by ballot as herein provided.”

The effort at revival was unfortunately vain, and when in 1859 international trouble again seemed to be brewing, instead of appealing once more to the immemorial defence of the country, the Government weakly and with most deplorable results allowed the formation of a new body, the volunteers—a body whose patriotism was noble, whose intentions were admirable, but whose inefficiency became and remained a by-word. The militia continued ingloriously, mainly as a nursery for the regular army.

Finally, in 1908, Mr. (now Lord) Haldane absorbed both volunteers and militia into the new Territorial and Reserve Forces, the militia becoming a special reserve. It is much to be regretted that the Act of 1908 did not expressly reaffirm the continued validity of the compulsory principle of service which from the earliest times has been the basis of the militia. But, though it did not expressly reaffirm it, it left it absolutely unimpaired and intact. Said Mr. Haldane himself in the House of Commons on April 13, 1910: “*The Militia Ballot Acts and the Acts relating to the local militia are still unrepealed, and could be enforced if necessary.*”

VI. Conclusion.

Such is the condition of things at the present time. The principle of compulsory military service, obligatory upon every

able-bodied male between the ages of sixteen and sixty, is still the fundamental principle of English law, both common law and statute law. It has been obscured by the pernicious voluntary principle, which, in the much-abused name of liberty, has shifted a universal national duty upon the shoulders of the patriotic few. But it has never been revoked or repudiated.

It is not national service, but the voluntary system, that is un-English and unhistoric. The Territorial army dates from 1908; the volunteers from 1859; the regular army itself only from 1645. But for a millennium before the oldest of them the ancient defence of England was the Nation in Arms. When will it be so again?

EMPLOYMENT OF PRISONERS OF WAR.

A statement in an Amsterdam newspaper that the French prisoners of war working in the coal mines have gone on strike, on the ground that the work which they had been ordered to perform was against the interest of their country, will call attention to the principles of international morality in reference to the employment of prisoners of war. It is indisputable that such prisoners may be employed at work not unsuited to their condition and not directly hostile to their own army or country, and this Bluntschli construes into an authorization for their employment on distant fortifications—a claim properly condemned on principle. Prisoners should not be employed to strengthen their captor's military position, for this tends to release a corresponding number of his soldiers for service at the front. The more modern practice confines their labour to what contributes to their own welfare. The Hague rules authorize a State to utilize the labour of prisoners of war according to their rank and aptitude. Their tasks shall not be excessive and shall have nothing to do with military operation. Prisoners may be authorized to work for the public service for private persons, or on their own account and work done for the State shall be paid for according to the tariffs in force for soldiers of the national

army employed on similar tasks. When the work is for other branches of the public service or for private persons the conditions shall be settled by agreement with the military authorities. The wages of the prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance: Hague Conference, 1899, Second Convention, art. 1. It has been sometimes the practice, now sanctioned by the Hague Conference, for officers to receive their regular pay or some proper pay from their captors, who in their turn balance accounts on this score with the enemy. Thus in 1870 the Germans paid French officers and the French paid captive officers and men also: Hague Conference, 1899, Second Convention, art. 17.—*Law Times*.

It is sometimes said by thoughtless people that there is a preponderance of lawyers in legislative and executive offices. It must be remembered, however, that the Government of a country not only makes, but interprets and enforces laws. It is clear, therefore, that the most competent class would be those who are familiar with laws, and their working out. A contemporary referring to this subject quotes an ancient Act, passed in the 6th year of Henry IV, by the "Parliamentum Indoctum," which parliament was elected under an ordinance requiring that no lawyer should be chosen knight, citizen or burgess. "By reason whereof," says Coke, "this parliament was fruitless, and never a good law was made thereat:" 4 Inst. 48.

REVIEW OF CURRENT ENGLISH CASES.

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PRIZE COURT—EVIDENCE IN PRIZE CASES—CONTRABAND ABSOLUTE AND CONDITIONAL—CONTINUOUS VOYAGE—DECEITFUL DESCRIPTION OF GOODS—ULTIMATE HOSTILE DESTINATION—ORDERS IN COUNCIL OF AUG. 20 AND OCT. 29, 1914.

The Kim (and 3 other vessels) (1915) P. 215. This was a proceeding in the Prize Court for condemnation of the "Kim" and three other vessels which had been captured by the British forces. The vessels in question were under time charters to an American corporation, the president of which was a German, and the general agent of the company in Europe was also a German. The four vessels started from New York, after the war began, for Copenhagen, with large cargoes of lard, hog and meat products; oil, stocks, wheat and other products. Two of them were laden with rubber, which in the papers was styled "gum," and one of them was laden with hides. The Court (Sir Samuel Evans, P.P.D.) found on the evidence that the cargoes of all the vessels (other than the portions thereof acquired by persons in Scandinavia, whose claims were allowed) were not destined for consumption in Denmark or intended to be incorporated in the general stock of that country by sale or otherwise, and that Copenhagen was not the real *bonâ fide* place of delivery, but that the cargoes were by the intention of the shippers on their way at the time of capture to German territory as their actual and real destination, and that, therefore, the cargoes must be condemned as lawful prize, and that, even if the conclusion arrived at was only accurate as to a substantial proportion of the goods, the whole would be affected, because contraband articles are said to be of an infectious character and contaminate the whole cargo belonging to the same owners. The learned Judge found that the use of the word "gum" instead of "rubber" was intended to mislead, and said that any such attempts at deception will weigh heavily against claimants guilty of them while he sits in the Prize Court. He said, quoting the American Supreme Court, "Belligerents are entitled to require of neutrals a frank and *bonâ fide* conduct." A recent decision of a German Prize Court in the case of "The Maria" the learned Judge refers to as a "shocking example," shewing how

a Prize Court in Germany can "hack its way through" *bonâ fide* commercial transactions when dealing with foodstuffs carried by neutral vessels.

MASTER AND SERVANT—CONTRACT OF SERVICE—NOTICE OF BREACH OF CONTRACT TO SUBSEQUENT EMPLOYER—CONTINUATION OF SERVICE AFTER NOTICE OF BREACH OF PRIOR CONTRACT—LIABILITY OF SUBSEQUENT EMPLOYER.

Wilkins v. Weaver (1915) 2 Ch. 322. This was an action brought by a company against Weaver, who had been a servant of the plaintiffs, and had committed a breach of his contract with the plaintiffs, and the defendant company, who had continued Weaver in their employment after notice of his having committed a breach of his contract with the plaintiffs. Joyce, J., who tried the action, found that the defendant Weaver had committed a breach of his contract with the plaintiffs, and that the defendant company had continued him in their employment after notice of such breach, and he declared that both Weaver and the defendant company were liable to the plaintiffs for the damages they had thereby sustained, following *De Francesco v. Barnum*, 63 L.T. 514.

MONEY LENDER—TRANSACTION HARSH AND UNREASONABLE—EXCESSIVE INTEREST—COMPOUND INTEREST—PAYMENT BY INSTALLMENTS—DEFAULT CLAUSE—MONEY LENDERS ACT, 1900 (63-64 VICT. c. 51) s. 1—(R.S.O. c. 175, s. 4).

Halsey v. Wolfe (1915) 2 Ch. 330. This was an action to reopen a money lending transaction as being harsh and unreasonable under the Money Lenders Act, 1900, (see R.S.O. c. 175, s. 1). The defendant (a money lender) had on four occasions advanced money to the plaintiff (a tradesman), upon what the defendant himself described as a fair average risk. The first advance was £100 at what amounted to 72 per cent., and the second advance was £50 at what amounted to 120 per cent., and the other advances were made at equally extortionate rates. The advances were repayable by instalments, secured by promissory notes, which were subject to a proviso that, if default were made in any of them, all should become due. After six instalments were paid, the action to reopen the transaction was commenced. Joyce, J., held that, in the circumstances of the case, the charges made by the defendant were exorbitant and excessive; and that the whole course of dealing with the plaintiff in respect

of interest and otherwise was harsh and unconscionable within the meaning of the Money Lenders Act, 1900 (see R.S.O. c. 175), and that the plaintiff was entitled to relief, and that, in taking the account, the rate of interest should be 15 per cent. per annum.

COMPANY—MANAGER—REMUNERATION BY A PERCENTAGE ON
ANNUAL NET PROFITS—PRIOR DEDUCTION OF INCOME TAX.

Johnston v. Chestergate H.M. Co. (1915) 2 Ch. 338. In this case the plaintiff was the manager of the defendant company at a fixed salary and a percentage of the annual net profits of the company. The agreement provided: "For the purposes of this clause the words 'net profits' shall be taken to mean the net sum available for dividends as certified by the auditors of the company after payment of all salaries" and other items, which did not include certain items which would be deducted before arriving at the net profits, or the income tax payable by the company. In fixing the net profits for the purpose of computing the percentage payable to the plaintiff the auditors deducted the income tax, but Sargant, J., held that they erred in so doing, and that their certificate, being based on a wrong principle, was not binding on the Court.

MORTGAGE—EXPECTANT SHARE AS ONE OF NEXT-OF-KIN OF LIVING
PERSON—ASSIGNMENT BY WAY OF MORTGAGE—BANKRUPTCY
AND DISCHARGE OF MORTGAGOR BEFORE FALLING INTO POSSES-
SION OF SHARE.

In re Lind, Industrials Syndicate v. Lind (1915) 3 Ch. 345. This was a contest between assignees of an expectant share of one of the next-of-kin of a living person in such person's estate. In 1905 one Lind, one of the next-of-kin of his mother, who was insane, and had never made a will, mortgaged his presumptive share in her estate to the N. Society. In May, 1908, he made a second mortgage of the share to one Arnold. In August, 1908, he was adjudicated bankrupt, and subsequently obtained his discharge; neither the N. Society nor Arnold proved in the bankruptcy. In 1911 Lind made an assignment of his expectant share to the plaintiffs, and in 1914 the mother died and the share fell into possession. The plaintiffs claimed, as assignees, to be entitled to the share free from the mortgages, which they contended only amounted to a covenant, the liability on which had been discharged by the discharge in bankruptcy, but the Court of Appeal (Eady, Phillimore and Bankes, L.JJ.) agreed with Warrington, J., that the prior mortgages constituted an

equitable charge on the share, which took effect on the share falling into possession; and that this charge was unaffected by the discharge in bankruptcy.

COPYRIGHT—RAILWAY GUIDE—INDEX OF RAILWAY STATIONS—MONTHLY PUBLICATION—COPYRIGHT ACT, 1911 (1-2 GEO 5 c. 46), ss. 1, 2, 7-35.

Blacklock v. Pearson (1915) 3 Ch. 376. This was an action for infringement of copyright. The plaintiffs were the proprietors of the well-known Bradshaw's Railway Guide, which was published monthly and copyrighted. It contained a list of all the railway stations in the United Kingdom, and the list, though it might vary in some particulars as occasion might require, was reproduced in each monthly publication. The defendants, for the purpose of a newspaper competition, published for sale to intending competitors a list of railway stations, and, for the purpose of compiling the list resorted to, and used the list contained in the plaintiffs' railway guide. The plaintiffs claimed that they were entitled to copyright for the whole and every part of each number of their guide, notwithstanding some parts may have appeared in their prior publications. The defendants claimed that the plaintiffs' guide was not the subject of copyright at all, and that, at all events, the reproduction in a later edition of matter which had appeared in a former edition conferred no new copyright in respect of that old matter. Joyce, J., who tried the action, upheld the plaintiff's contention that each monthly number was properly as to its whole contents properly subject of a new copyright each month.

LIQUOR LICENSE—SALE OR CONSUMPTION OF INTOXICATING LIQUOR IN PROHIBITED HOURS—GRATUITOUS SUPPLY TO FRIENDS OF LICENSEE.

Blakey v. Harrison (1915) 3 K.B. 258. On a case stated by magistrates, it was held by a Divisional Court (Lord Reading, C.J., and Ridley and Scrutton, JJ.) that where a landlord of licensed premises gratuitously supplied his friends with beer, which they drank on the premises, during a period when the sale or consumption of liquor on such premises was suspended by order of the licensing Justice, this treating of his friends was not a contravention of the order; the Court being of the opinion that the consumption of liquor by the licensee, or members of his family, or his friends, while the premises were closed to the public, was not a consumption within the meaning of the Act authorizing the making of the order, or the order, and therefore that the complaint was properly dismissed.

MARINE INSURANCE—RUNNING DOWN CLAUSE—DAMAGE IN CONSEQUENCE OF COLLISION.

France Fenwick & Co. v. Merchants Marine Insee. Co. (1915) 3 K.B. 290. The Court of Appeal (Lord Reading, C.J., Eady, L.J., and Bray, J.) have affirmed the decision of Bailhache, J. (1914) 3 K.B. 827 (noted ante p. 33), but on somewhat different grounds to those relied on by that learned Judge.

PRACTICE—LIBEL—JUSTIFICATION—CHARACTER AND REPUTATION—PARTICULARS OF JUSTIFICATION—ACTS OCCURRING AFTER DATE OF PUBLICATION.

Maisel v. Financial Times (1915) 3 K.B. 336. This was an action for libel, charging that the plaintiff, a managing director of a company, was of bad reputation, and was likely to have misappropriated the funds of the company. The defendants pleaded justification, and, being ordered to deliver particulars of their defence, set out facts which supported and justified the words of the alleged libel which had taken place after the publication of the alleged libel. The Master, on motion in Chambers, had struck out so much of the particulars as related to events subsequent to the libel, but Ridley, J., reversed the order, and the Court of Appeal (Cozens-Hardy, M.R., and Pickford and Warrington, L.J.J.) affirmed the order of Ridley, J. As Pickford, L.J., puts it: To the question whether, where there is a plea of justification, it is possible to give, in support of the plea, particulars alleging facts which occurred after the libel, it is impossible to answer yes or no, because it depends on the nature of the libel, and also on the nature of the acts relied on. Here the libel was published in the middle of January and the acts relied on were done about the middle of the following February, and continued, as alleged, systematically until the following May, on all which occasions, as was alleged, the plaintiff, having the opportunity, had acted fraudulently. Such particulars were considered therefore admissible.

SHIP—CHARTER PARTY—SALE OF SHIP, AND RIGHT UNDER CHARTER PARTY—REFUSAL OF CHARTERER TO LOAD SHIP.

Fratelli Sorrentino v. Buerger (1915) 3 K.B. 367. The Court of Appeal (Eady, Phillimore, and Bankes, L.J.J.), have affirmed the judgment of Atkin, J. (1915) 1 K.B. 307, noted ante p. 242. The case is not any authority that as a general rule a ship which is the subject of a charter party can be sold so as to transfer to the purchaser the vendor's duty of performing the charter

party, but merely that the sale does not *ipso facto* put an end to the charter party, as the defendant contended in this case, because, as Bankes, L.J., points out, it is quite possible that the terms of sale may provide that the vendor is still to perform the charter party notwithstanding the sale.

INSURANCE (MARINE)—PERIL OF MEN-OF-WAR, RESTRAINTS OF PRINCES—SHIP PUTTING INTO NEUTRAL PORT TO AVOID CAPTURE—LOSS OF VENTURE—PROXIMATE CAUSE OF LOSS.

Becker v. London Assurance Co. (1915) 3 K.B. 410. This was an action on a policy of marine insurance on goods shipped on board a German ship for carriage from Calcutta to Hamburg. The policy insured against the usual perils, including men-of-war, enemies and restraint of princes. After the vessel started on its voyage war was declared between Germany and Great Britain, and, to avoid capture, the vessel put into a neutral port, where it had ever since remained and was intended to remain until the termination of the war. The plaintiffs endeavoured to get possession of the goods, but the captain of the vessel refused to deliver them up. In November the German Government issued a prohibition against the delivery to their owners of any goods belonging to British subjects on board German ships. In consequence of that prohibition, the plaintiffs gave the defendants notice of the abandonment of the goods, and brought the action as for a total loss. The action was tried before Bailhache, J., who held that the goods were not lost by any peril insured against. In his opinion, the ship went into the neutral point to avoid the commencement of the peril insured against, and although the goods were just as effectually lost to the plaintiffs as if they had in fact been captured, yet he held that a loss which arises from steps taken to avoid a peril cannot be said to be due to the peril so avoided.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL—CONVICTION—SENTENCE OF DEATH—PETITION FOR LEAVE TO APPEAL—STAY OF EXECUTION OF SENTENCE.

Balmukand v. The King-Emperor (1915) A.C. 629. This was a petition for leave to appeal from a conviction for criminal conspiracy to murder to the Judicial Committee of the Privy Council, the applicant having been sentenced to death. The counsel for the applicants not being able to proceed with the application, owing to the non-arrival of the record, asked the Judicial Committee to make a recommendation to the Govern-

ment of India that the carrying out of the sentence should be postponed pending the hearing of the petition, but the Committee refused to make any recommendation or to express any opinion, holding that it was a matter for the Executive Government to deal with.

NUISANCE—COLLIERY COMPANY—LESSEES FROM COMMON LESSOR
—PERMISSION TO CARRY ON TRADE OF MINER—IMPLIED RIGHT
TO COMMIT NUISANCE—DEROGATION FROM GRANT.

Pwllbach Colliery Co. v. Woodman (1915) A.C. 634. The plaintiffs and the defendants were lessees of adjacent properties from the same lessor. The defendants' property was a coal mine; the plaintiffs' property was used for carrying on the business of a butcher and slaughterhouse. Subsequently the defendants erected on the land demised to them screening apparatus, near the plaintiffs' trade buildings, and, as a result of their screening operations, coal dust was deposited on these buildings. The action was to restrain this nuisance, and, at the trial, the jury found that a nuisance was caused by the defendants, but that their screening operations were carried on in a reasonable manner and in a way that was usual in the district and without negligence. The Court of Appeal, reversing the decision of Horridge, J., held that the grant of the right to carry on the business of miners did not authorize the committal of a nuisance, and, in the absence of proof that the trade could not be carried on without creating a nuisance, the plaintiff was not precluded by the terms or circumstances of the grant from obtaining relief, and the House of Lords (Lords Loreburn, Atkinson, Parker, Sumner and Parmoor) affirmed the decision.

Reports and Notes of Cases.

Dominion of Canada.

SUPREME COURT.

DORCHESTER ELECTRIC Co. v. KING.

DORCHESTER ELECTRIC Co. v. THOMSON.

DORCHESTER ELECTRIC Co. v. INDUSTRIAL SECURITIES Co.

Lane, J.]

[24 D.L.R. 373.

1. *Specific performance—Agreement for subscription of bonds—Right to remedy.*

An underwriting agreement providing for subscriptions to an issue of debentures, whereby subscribers agree to give money by instalments or otherwise in exchange for debentures or bonds is tantamount to an agreement to borrow and loan money, and hence is not susceptible of specific performance.

2. *Corporations and companies—Bonus stock—Illegal issue—Effect on bond subscription.*

Where a company as a special inducement to subscribers for its debentures offers a bonus of common stock such inducement is an essential and important consideration of the contract; and therefore if such issue of stock is null and illegal the underwriting agreement itself becomes void.

3. *Corporations and companies—Issue of stock before payment—Watered stock—Illegality.*

Under the Quebec Companies Act, stock issued direct from the treasury of a company without being paid for in cash is watered stock and therefore illegally issued and void, even though it be claimed that such stock represents the increased value of the company's property.

4. *Corporations and companies—Issue of stock—Mode of payment—Statutory requirements.*

Under the Quebec Companies Act no issue of stock not paid for in cash is legal unless a contract be filed with the Provincial Secretary at or before the issue thereof shewing that payment in a form other than cash had been sanctioned.

ANNOTATION ON ABOVE CASE FROM D.L.R.

Etymologically it is nothing more than Latin word "debentur." The word was the first in the form of acknowledgment used by the Crown in old days, and given by it to creditors of the Crown, to soldiers and to the King's servants for payment of their wages. (Parliamentary Rolls, 3 Henry V. 1415.)

The word is used in the same sense in the Pasten Letters in 1455: "debentur made to the said Falstaff with him remaining." The word was employed to describe an instrument under seal evidencing a debt.

The essence of a debenture was an admission of indebtedness, and this is still its essential characteristic.

Edmonds v. Blaina Company (1887), 36 Ch.D. 219, gives this definition: "The term itself imports a debt—an acknowledgment of a debt—and speaking of the numerous and various forms of instruments which have been called debentures, without anyone being able to say that the term is incorrectly used, I find that generally—if not always, the instrument imports an obligation or covenant to pay. This obligation or covenant is in most cases at the present day, accompanied by some charge or security."

The authorities appear to agree in the view that any instrument other than a covering deed, which either creates or agrees to create a debt in favour of one person or corporation, or several persons or corporations, or acknowledges such debt, is a debenture.

"Debenture stock," says Lord Lindley, at p. 195, "is merely borrowed capital consolidated into one mass for the sake of convenience. Instead of each lender having a separate bond or mortgage, he has a certificate entitling him to a certain sum, being a portion of a large loan."

The contract to take up debentures or debenture stock is usually made by application followed by allotment. When a subscriber for debentures makes default in paying up any instalments, he cannot be compelled specifically to perform a contract by paying up the instalments, for the Court will not grant specific performance in such a case. (*Palmer's Company Precedents*, 8th ed., part 3, p. 151.) The company's remedy is to sue for damages for breach of contract and such damage has been held to be the difference between the rate of interest payable by the company to the allottee of the debentures, and the rate of interest which the company would have to pay in order to put the company in the same position as if the contract had been performed. *Bahamas Sisal Plantation, Ltd. v. Griffin*, 14 T.L.R. 139.

If the sole reason why the company is unable to raise money, or is compelled to raise money on onerous terms, is that it has fallen into disrepute and bad financial odour, the company will not be entitled to recover damages from a defaulting subscriber to debentures or debentured stock. (*Simonson*, 3rd ed., p. 66.)

The leading case on this question is *South African Territories Limited v. Wallington* (1 Q.B. 692, [1898] A.C. 309). In this case the applicant for debentures sent his cheque for £80, being a deposit of £5 per debenture on 16 debentures of the company, and required it to allot him that number of debentures, and agreed to pay the instalments due in accordance with the terms of the prospectus. The debentures were duly allotted. The defendant never paid any further instalments. The company sued for specific performance of the contract and the balance of price of the debentures. The Court of Appeal dismissed the action holding that no action for specific

performance would lie, or to compel the lending of the money contracted for. The House of Lords confirmed this judgment, and Halsbury, L.C., stated:—

“The forms which have been contrived for the business of Joint Stock Companies, and which, when applied to their proper purpose, are convenient, are somewhat calculated to mislead when their mere language is recorded. The application for debentures on the face of the instrument, asks to pay something. But the real nature of the whole transaction is an agreement of the applicant to lend money at a certain interest, and the action in this case was, in truth, mainly, if not altogether, instituted to compel the intending lender to perform his contract to lend, which, doubtless, he had refused and neglected to do. With respect to the claim for specific performance, a long and varied course of decisions has prevented the application of any such remedy, and I do not think that any Court or any member of any Court has entertained a doubt but that the refusal of the learned Judge to grant a decree for specific performance was perfectly right.” ([1898] A.C. 312.)

See, to the same effect, *West Waggon Company v. West* ([1892] 1 Ch. 271); *Parker & Clarke, Company Law*, p. 119; *Mulvey*, p. 94; *Masten*, p. 165.

Art. 1065 of the Civil Code, Que., lays down a similar rule: “Every obligation renders the debtor liable in damages in case of a breach of it on his part. The creditor may, in cases which admit of it, demand also a specific performance of the obligation, and that he be authorized to execute it at the debtor’s expense, or that the contract from which the obligation arises be set aside; subject to the special provisions contained in this code, and without prejudice, in either case, to his claim for damages.”

It has always been properly held that a plaintiff cannot come into Court for the purpose of having the defendant constituted his creditor, and this is virtually what a demand to enforce specific performance of a contract of loan amounts to. The only remedy, under Quebec law, is an action in damages, because, in that event, the plaintiff is properly bringing his claim as creditor of the defendant, who, by his breach of covenant, has become liable in damages, if any result, and therefore has become the debtor of the plaintiff.

In England, following the Wallington decision of the House of Lords, the law was amended, specifically giving companies the right to enforce specific performance of subscriptions for debentures. At the present day an action of the nature of the case just reported would lie, but, as the law has not been changed in Canada, or in the Province of Quebec, such an action cannot be recognized.

It may be noted that the different Companies’ Acts in this country provide for the specific performance of the contract whereby a subscribing shareholder agrees to take stock in the company. •

ISSUE OF BONUS STOCK.

The provisions of the Quebec Companies Act are much more drastic than those of the Federal Act.

Art. 6036 R.S.Q. 1909, enacts as follows: "The capital stock of the company shall consist of that portion of the amount authorized by the charter, which shall have been *bond fide* subscribed for and allotted, and shall be paid in cash, unless payment therefor in some other manner has been agreed upon by a contract filed with the Provincial Secretary at or before the issue of such shares. . . .

No stock shall be issued to represent the increased value of any property. Any such issue shall be null and void.

The practice commonly known as watering of stock, is prohibited, and all stock so issued shall be null and void.

The capitalization of surplus earnings, and the issue of stock to represent such capitalized surplus are also prohibited, and all stock so issued shall be null and void, and the directors consenting to such issue of stock shall be jointly and severally liable to the holders thereof for the reimbursement of the amount paid for such stock.

Every form and manner of fictitious capitalization of stock in a company, or the issuing of stock which is not represented by a legitimate and necessary expenditure in the interest of such company, and not represented, with the exception mentioned in paragraph 1 of this article, by an amount in cash paid into the treasury of the company, which has been expended for the promotion of the objects of the company, is prohibited, and all such stock shall be null and void."

This legislation is in line with leading English decisions. It is universally conceded that shares cannot be issued at a discount. Under the Federal Act they may be paid for either in cash or the equivalent of cash, but, under the Quebec Act, any payment in manner other than cash, requires to be evidenced by contract filed with the Provincial Secretary, at or prior to the issue of the shares.

In *North-Western Electric Co. v. Walsh*, 29 Can. S.C.R., Sedgewick, J., p. 46, lays down the general rule, basing himself on the *Oregon Gold Mining Co. v. Roper*, [1892] A.C. 125, as follows: "It is elementary law that no joint stock company can issue stock below par, unless authorized to do so by the legislature under whose authority it was created."

The principle laid down by sec. 6036 R.S.Q., has been approved by the Supreme Court in *Morris v. Union Bank*, 31 Can. S.C.R. 594.

"It is impossible," said the Chief Justice, "in the teeth of the statute which requires that when shares are contracted to be paid for, not in money, but in money's worth, there must be an agreement in writing, to otherwise dismiss this appeal."

The issue of bonus stock by companies has been condemned in many decisions: *Eddystone Marine Ins. Co.*, [1893] 3 Ch. 9. See also *Bury v. Famatina Development Corp.*, [1910] A.C. 439.

"The public are sometimes induced to take debentures of a company,

by an offer on the part of the directors to give to the person advancing money on such securities, one or more fully paid up shares in the company, by way of bonus, for every debenture which he takes. The holders of shares so allotted as fully paid up, will, on the company being wound up, be placed on the list of contributories for the full amount of their shares, for the company cannot so allot shares as fully paid up by way of bonus." (Simonson on Debentures, 3rd ed., p. 90.)

Palmer, 7th ed., part 1, p. 808, states that formerly it was not uncommon to offer debentures for subscription on the footing that the company would give to the subscribers not only debentures for the amount advanced, but paid up shares of the company by way of bonus; but as this in effect amounts to issuing shares at a discount, it is *ultra vires*.

In *Railway Time Tables Publishing Co.*, [1895] 1 Ch. 255, the holder of such shares was held liable on winding up. See also *Almada v. Tirito Co.* (1888), 38 Ch.D. 415, and *Re Weymouth and Channel Islands Steam Packet Co.*, [1891] 1 Ch. 66; *Re Veuve Monnier et Fils. Ltd.*, [1896] 2 Ch. 525.

In *Mosely v. Koffyfontein Mines*, [1904] 2 Ch. 108, it was held that bonus certificates issued with debentures and made payable out of profits only, could not be made the consideration for the issue of paid up shares.

Apart from the liability of the shareholders who have accepted such bonus stock, as paid up, when, as a matter of fact, no valid consideration has been given whatever, to be placed upon the list of contributories in the event of winding up, the directors who are party to the allotment of the bonus shares may be liable to contribute to the assets of the company by way of compensation in respect of their breach of trust.

In *Hirache v. Sims*, [1894] A.C. 654, where the directors improperly issued shares at a discount, it was held that they were answerable to the company for the discount allowed, but that they were not liable beyond the discount, in the absence of proof of fraud or of further resulting damage.

In *Re Wiarton Beet Sugar Co.* (1906), 12 O.L.R. 149, a director, party to the allotment of bonus shares, was held liable to contribute by way of compensation for his breach of trust.

The usual course adopted by careful directors, or financial agents who obtain subscriptions for debentures, consists in their obtaining for these, from the company, in return and in consideration for their promotion services, a certain amount of shares of the company, issued to them as fully paid up and non-assessable, in accordance with the memorandum of agreement and the powers conferred upon the company by the charter. Then, in order to facilitate the placing of the bonds, holders of these promotion shares, legally issued, give and transfer to the subscribers to the bonds, a certain quantity of these shares, proportionate to the amount of the subscription. And in this case the holder of the debenture or debenture stock becomes, at the same time, a shareholder of the company without being in any way liable for calls.

War Notes.

We are glad to record what may be said to be the true sentiment of the best people of the United States, speaking of them as a whole, as to this present war. It is set forth in the letter of Colonel Roosevelt to Professor Dutton, of Columbia University, Secretary of the American Committee of the Armenian and Syrian Relief, in answer to a request for the ex-President to speak at a meeting in behalf of that object. The letter is partly as follows:—

"If this people, through its Government, had not shirked its duty for five years and this people in connection with the world for the last 16 months, we would now be able to take effective action on behalf of Armenia. Mass meetings on behalf of the Armenians amount to nothing whatever if they are mere methods of getting a sentimental but ineffective and safe outlet to the feelings of those engaged in them. Indeed, they amount to less than nothing. The habit of giving expression to feelings without following the expression by action is, in the end, thoroughly detrimental both to the will power and to the morality of the people concerned.

"As long as this Government proceeds, whether as regards Mexico or as regards Germany, whether as regards the European war or as regards Belgium, on the principles of the peace-at-any-price-man, or the professional pacifist, just so long it will be absolutely ineffective for international righteousness as China itself. The men who act on the motto of 'safety first' are acting up to a motto which could be appropriately used by the men on a sinking steamer who jumped into the boats ahead of the women and children, and who, at least, do not commemorate this fact by wearing buttons with 'safety first' on them as a device. Until we put honour and duty first, and are willing to risk something, in order to achieve righteousness, both for ourselves and for others, we shall accomplish nothing; and we shall earn and deserve the contempt of the strong nations of mankind.

"The American pacifists, the American men and women of the peace-at-any-price type, who join in meetings to 'denounce war,' or with empty words 'protest' on behalf of the Armenians or other tortured and ruined peoples, carry precisely the weight that an equal number of Chinese pacifists would carry at a similar meeting."

Colonel Roosevelt's views are, of course, not the views of President Wilson, but they are the views of a large portion of the citizens of their country, and some of them are now putting their principles into practice. An Overseas Battalion is being organized in the City of Toronto, under the name of the "American Legion," composed of American-born and nationalized American citizens living in Canada. Already some 500 have enlisted, and recruits are coming in rapidly. The officers, we are told, are all American-born subjects; two of them from West Point and two Naval officers from Annapolis Naval Station. The senior Major is an ex-United States army officer; and a number of the men have been soldiers in the regular army of that country. Colonel Clark, formerly of New York, is in command, and has his headquarters at the Exhibition Park Camp in Toronto. We may be sure that these enthusiastic men will give a good account of themselves when they get to the front, which they are anxious to do as soon as possible.

And still they come, to fight for their King and Country. We have British born and those from the Dominion and outlying dependence: white, black, yellow and red. And now we shall have a good representation of the North American Indians, descendants of the braves, who fought so well for their English friends when old France was our enemy and not our ally, and in the War of 1812. They will all be attached to the Haldimand Battalion; the Colonel of which is one of our legal officials, his second in command being of the legal profession, and his name appearing as the second name on the front page of this journal.

Book Reviews.

The Law Quarterly Review, Edited by the Rt. HON. SIR FREDERICK POLLOCK, Bart., D.C.L., LL.D. London: Stevens & Sons Limited, Chancery Lane.

The October number of this, the greatest of our legal magazines gives an interesting menu to its readers. It consists of:—Notes of Cases—The origins and early history of negotiable instruments—Norway's integrity and neutrality—Notice of fraud in registration of title to land—Registration of title on business lines—The King's Chamber; and it may be well here to explain that "The King's Chamber" means a space of water

lying within a straight line drawn from one point of land or adjacent island to the next point of land or island upon the English shores. The prowess of the British Navy has happily made all the waters of this planet (except the Kiel Canal) "The King's Chamber," and to this agrees the words of the poet: "The sea is merrie England's and England's shall remain." Other articles are:—The apportionment of annuities between tenant for life and remainderman—Hindu Wills—Domicile in countries granting ex-territorial privileges—The effect of war on the German legal mind; as to this it may safely be said that the German legal mind now appears to be in the same distorted condition as their lay mind it remains to be seen how long it will take to bring them back to a normal condition.

Crustula Juris: Being a Collection of Leading Cases on Contract done into Verse by MARY E. FLETCHER and B. W. RUSSELL. With a preface by HUMPHREY MELLISH, K.C., and an Introduction by Mr. Justice RUSSELL.

This comes to us from Nova Scotia, whose foremost statesman was also a poet. Poetry is still a passion there with men and women of affairs. Had not information been vouchsafed us in the book itself, many would have gone in ignorance of the real meaning of its title, for, notwithstanding the unmistakable Horation savour of "*Crustula*" in the nostrils of the learned, to most of us the word is a dark saying, and, coupled with "*Juris*," is not apt to connote an enterprise of mixing the dry flour of English caselaw with the waters of Aganippe, and so producing legal sweetmeats. But let us quote Mr. Justice Russell's reading of its meaning in his clever metrical introduction to the book:—

"Crustula, dear Horace calls them—
'Little cakes' for youngling's jaws;
When the stronger food appals them
Stuff these in their tender maws!

"In our modern poets' pages
Rhyme and reason seldom blend,
But the wisdom of the sages
Here to you in verse we send."

Bolingbroke, quoting Cicero, declares that a lawyer must be something more than a mere *cantor formularum*. He must sing the eternal principles of right. So, as we have hinted above, the enterprise of putting law into poetry could hardly be new. Pit-tacus, one of the Seven Wise Men of Greece, wrote his laws in

verse. The bards of ancient Erin officiated as judges, chanting their dooms for the hanging of many a man whose deeds did not respond to their notions of justice, poetic though it was. In our own times, Sir Frederick Pollock and the lamented Irving Browne have forestalled these new singers by the sea in marrying the blind goddess to Apollo. But "*Crustula Juris*" is worthy of a place on the shelf where the meistersingers of the Law are wont to abide.

There is an inimitable "Foreword" by Humphrey Mellish, K.C., the acknowledged *homme de génie* of the Nova Scotian Bar. We have his word for it that "the verses can do no harm"—and what a benison of the book is implied in that remark! Lastly, the whole of both authors' and publishers' profits are to be given in aid of the children rescued from the ruins of Ypres and other Flemish towns. The book merits a ready sale for all these reasons.

Bench and Bar.

JUDICIAL APPOINTMENTS.

The vacancy on the Bench of the Chancery Division of the High Court of Justice in England caused by the retirement of Mr. Justice Joyce has been filled by the appointment of Mr. Arthur Frederic Peterson, K.C., who was for several years leader in the Court of Mr. Justice Neville. It is said that he will be a valuable addition to the English Bench.

John Leslie Jennison, of the city of Calgary, Alberta, K.C., to be Judge of the District Court of the District of Calgary, Alberta, vice Arthur A. Carpenter, resigned. (November 17.)

LAW OFFICERS OF THE CROWN—ENGLAND.

The Right Hon. Sir Frederick Smith, K.C.M.P., who was appointed Solicitor-General on the formation of the Coalition Government last May, has been appointed to be Attorney-General, in succession to the Right Hon. Sir Edward Carson, resigned. The Right Hon. George Cave, K.C.M.P., is now to be Solicitor-General, in succession to Sir Frederick Smith. Mr. Cave took high honours in classics at Oxford; was called to the Bar at the Inner Temple in 1880, and took silk in 1904. He is a member for the Kingston Division of Surrey, and has been for many years a leading member of the Conservative Party.

LORD ALVERSTONE.

As we go to press we hear of the death of this distinguished Englishman, who for 13 years was Lord Chief Justice of England, and who died on the 15th inst., at the age of 73 years.

In earlier days, he was known to the public as Sir Richard Webster, K.C. To his college chums and intimate friends he was Dick Webster, an all round sport and athlete; a warm friend and a fine specimen of an English gentleman. He was subsequently made Baron Alverstone, G.C.M.G. He became a prominent figure in Canadian history in connection with the Alaska Award in 1903. The part he took in that arbitration is fully discussed in a previous volume of this JOURNAL (ante Vol. 40, p. 3). Want of space forbids any further reference to his career in this issue.

ONTARIO BAR ASSOCIATION.

The annual meeting of this association will be held at Osgoode Hall, Toronto, on January 11th and 12th. The annual banquet will be given on the evening of the first day.

The notice calling the meeting is accompanied by the report of the Committee on Legal Ethics. As this report will come up for discussion at the meeting and will doubtless be fully considered, we need not at present examine it. We might say, however, that it seems to state briefly the main rules on this important subject and other noteworthy suggestion. We shall look forward with pleasure to the annual message of the retiring President, Mr. Field, K.C. He will, doubtless, give an interesting resumé of professional matters during the past year, meagre though it must of necessity be, owing to the engrossing fight for freedom in which our own country and our Allies are engaged.

A circular letter from the corresponding secretary gives details of the proposed proceedings, and will already be in the hands of the profession. We are glad to note that all County Court Judges and other officials are invited to attend the meetings.

At a meeting of the Judges of the Supreme Court of Ontario, held on the 6th December, 1915, the following Judges were selected to constitute the Second Divisional Court for the year 1916: Hon. R. M. Meredith, Chief Justice of the Common Pleas; Mr. Justice Riddell Mr. Justice Lennox, Mr. Justice Latchford and Mr. Justice Masten.

Flotsam and Jetsam.

It is tolerably well known that ladies have for some years been allowed to practise at the French bar. The last applicant for this privilege was Mademoiselle Madeleine Nizard, who, a few days ago, was presented to the First Chamber of the Tribunal of the Seine and took the oaths accordingly. This is the twenty-ninth occasion on which a similar application has been made. We are unable to supply any information as to the success of this new sisterhood as practitioners. A large proportion of the French bar begin their career in the criminal courts, in the hope of rising to fame by their eloquence in the defence of prisoners. A close attendance at these tribunals must be far from attractive to many women of delicacy and refinement.—*Solicitors' Journal*.

Lord Alverstone, in his "Recollections of Bench and Bar," tells this story of a distinguished English novelist and "a hard-working barrister by the name of Codd, who had a large family and was always struggling in his profession. In a post office prosecution, tried before Baron Bramwell at the Chelmsford Assizes, Codd was defending the prisoner. Among the witnesses was Mr. Anthony Trollope, the well-known novelist. He knew nothing about the facts of the particular robbery in question, but having an official position in the post office, he was called to prove the practice in the post office as to the sorting, removing, and otherwise dealing with the letters, so that the Jury might understand what opportunity the prisoner had had for committing the theft. I need not say that in such cases the witness is as a rule not cross-examined, but makes his statement and leaves the box. Accordingly Mr. Anthony Trollope, to whom Bramwell had nodded, was leaving the witness-box, when Codd, who saw an opportunity for making a point, said: 'Stop a moment, Mr. Trollope.' Trollope came back. 'What are you, Mr. Trollope?' said Codd, 'I have already told the Court that I am a supervisor in the post office.' 'But are you anything else?' Trollope replied: 'Yes, I am an author.' 'Ah!' said Codd, 'you are an author, are you? What was the last book you wrote?' Trollope replied: "'Barchester Towers,'" or whatever it was—the particular book is immaterial. 'Well, then,' said Codd, 'was there a word of truth in that book from beginning to end?' 'I do not understand what you mean,' replied Trollope. 'You can answer a plain question: Was there a word of truth in that book from

beginning to end?' 'It was a work of fiction,' 'Fiction or not, was there a word of truth in it from beginning to end?' 'Well,' said Trollope, if you put it in that way, there was not.' 'Odd said: 'Thank you, Mr. Trollope,' and sat down. He called no witnesses, but made a violent speech to the jury, in which he asked them how they could possibly convict the prisoner on the evidence of the principal witness when the principal witness was a man who was obliged to admit that he had written a book without a word of truth in it.'—*American Law Review*.

CARRIERS—COMPULSORY TREATMENT OF PASSENGER—LIABILITY.—A carrier which, after injury to a boy upon its car, takes him, against the protest of his guardian, to its own surgeon for treatment, is held liable in the South Carolina case of *Easler v. Columbia R. Gas & Electric Co.*, L.R.A. 1915D, 884, for an injury which the surgeon may inflict upon him through malpractice, whether it used care in the selection of a surgeon or not.

BURGLARY—OPENING BUILDING WITH KEY LAWFULLY ACQUIRED.—An employee opening a building at a time when his duties did not require him to do so, by means of a key furnished him by the employer for the limited purpose of opening the store for business in the morning, followed by his taking property of his employer therefrom with intent to convert it to his own use, is held a sufficient breaking to constitute burglary, in *State v. Corcoran*, L.R.A. 1915D, 1015.

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The price of the "Living Age" is \$6.00 a year, and specimen copies will, we are told, be sent free.

ANALYTICAL INDEX

Accident—

Premeditated attack is an, within Workmen's Compensation Act, 100.
See Highway—Municipal law—Negligence—Railway—Street Railway.

Administration—

See Executor and administrator.

Adulteration—

Coffee mixed with chicory—Notice, 248.

Alien enemies—

In public positions, 1.
Marine insurance—Right of action, 233.
As litigants in England, 141.
Rights to sue, 233, 238.
Trading with foreign insurance company, 239.
Company—Shares held by aliens, 327, 361, 365.
Rights of in relation to property, 345.
Trading with, 355, 362, 445.
Internment of—Necessity and legality, 390.
Naturalization of, 448.
Actions by—Discussion as to rights, 465.

Appeal—

To King in Council in forma pauperis, 100.
To Judicial Committee of Privy Council from sentence of death, 491.
To Supreme Court—Case originating in Superior Court, 63.
From finding of persona designata, 371.
From magistrate—Notice, 29.

Appointment—

See Power of appointment.

Ardagh, Judge—

Obituary, 114.

Articles of interest in contemporary journals, 263, 422.

Assignment f.b.o.c.—

Voluntary—Notifying creditors, 367.

Attachment of debts—

Fees paid to panel doctor, 325.

Attachment and committal—

Practice in Ontario, 425.

Banking—

Account at one branch—Payment demanded at another, 366.

Bar Associations—

See Law Societies.

Bench and Bar—

- Judicial appointments (Canada)—
 - Judge McKay—Saskatchewan, 37.
 - Sir Francois Lemieux, 117.
 - F. S. Maclellan—Superior Court, Quebec, 117.
 - Judge Dowsley—Leeds and Grenville, 117.
 - Judge Klein and Judge Greig—County of Bruce, 262.
 - Chief Justice Graham—Nova Scotia, 262.
 - Judge Ritchie—Nova Scotia, 262.
 - Judge Armstrong—Saint John, 304.
 - Judge Pelletier—Quebec, 384.
 - Judge Fraser—Prince Edward Island, 423.
 - Judge Lamothe—Quebec, 423.
 - Judge Codierre—Quebec, 423.
 - Judge Marechal—Quebec, 424.
 - Mr. Justice Masten—Ontario, 460.
 - Judge Jenison—Alberta, 501.
- Judicial appointments (England)—
 - Sir John Eldon Banker, 118.
 - Changes in England, 288, 429.
- Obituary—
 - Thomas Langton, K.C., 38.
 - Lt. Col. W. E. O'Brien, 70.
 - Judge Ardagh, 114.
 - Judge Hughes, 261.
 - Judge Finkle, 262.
 - Mr. Justice Maclellan, 303.
 - Samuel Barker, K.C., 341.
 - Sir Sandford Fleming, 382.
- Law students and the Bible, 57.
- Women as lawyers—Modern view, 79.
- Judicial irony, 308.
- Lawyers entitled to legal offices, 347.
- Professional ethics—Defending prisoners, 353.
- Sittings of the Courts, 461.
- Lawyers in the legislatures, 485.
- Law officers of the Crown as Members of Cabinet, 475, 501.
- Death of Lord Alverstone, 502.
- See Law societies.

Bills and notes—

- Note for goods supplied to maker—Guaranty, 34.
- See Cheque.

Book Reviews—

- Words and Terms judicially defined—Judge Widdifield, 112.
- The formal bases of law—D. De Vecchio, 113.
- Polarized law—The conflict of laws—T. Baty, 113.
- Mens rea or imputability under the law of England—D. A. Stroud, 113.
- Summary of the law of Companies—T. Eustace Smith, 114.
- Commentary on the law of Master and Servant—C. B. Labatt, 154.
- The principles of Equity—E. H. T. Snell, 255.
- Law Dictionary—John Bouvier, 256.
- Leading cases under Canadian constitutional law—A. H. F. Lefroy, 256.
- Law Reports annotated—Rochester, U.S.A., 256.
- Bullen & Leake's Precedents of Pleadings, 415.
- The principles of Bankruptcy—Richard Ringwood, 458.
- Illustrations in advocacy—Richard Harris, 459.
- Remedies of vendors and purchasers of Real Estate—C. C. McCaul, 459.
- The Law Quarterly, 499.
- Crustula Juris, 500.
- The Living Age, 504.

Breach of promise—
See Marriage.

Bribery—
See Criminal law.

British Cabinet—
Changes in, 258, 501.

Broker—
See Real estate agent.

Building contract—
See Contract.

Building society—
Official receiver—Mistake of Court—Refund, 237.

Carrie Davies case—
Criminal law—Murder—Unsatisfactory trial, 135.

Carrier—
Exemption from liability for damage, 232.
See Railway.

Case law—
Its origin and properties, 95.

Certiorari—
Crown office rule—Time limit, 328.

Cheque
Unconditional order to pay, 230.

Christianity—
Is it a part of the law, 385, 474.

Christian Science—
And the law, 58.

Company—
Prospectus—Misrepresentation—Directors, 318, 359.
Shares—Subscription for obtained by fraud, 334.
 Issue of, before payment—Watered, 493.
 Mode of payment—Statutory requirements, 493.
Directors—Contract with another company, 27.
 Liability of, for defective system, 111.
Manager—Remuneration by percentage, 488.
General meeting—Notice of—Sufficiency—Parties, 316.
Articles of association—Arbitration clause, 358.
Power to sell part of business to new company, 294.
Guaranty—Liability of members to contribute, 442.
Bonds—Agreement for subscription—Specific performance, 493.
 Bonus stock—Illegal issue, 493.
Debentures—Guarantee by trustees—Re-insurance—Liquidation, 295.
 Trust deed—Partly paid stock, 298.
Rights of minority shareholders, 349.

Company—Continued.

- Trading company—Powers—Suretyship, 373.
- Winding up—Unsecured creditors—Debenture holders, 295.
 - Liquidator—Removal of, 297.
 - Surplus assets—Payment of debt barred by statute, 299.
 - Judgment creditor—"Proceed to enforce," 317.
 - Deceased insolvent—Executor—Surplus assets, 362.
- See* Alien enemies—Building society—Mandamus—Negligence.

Compensation—

- See* Expropriation.

Constitutional law—

- Legislative powers—Provincial company—Non-resident shareholders, 60, 265.
- Federal and provincial rights, 105, 237.
 - Dominion company, 330.
- Alberta Railway Act, 332.
- See* International law—Succession duties.

Contraband of war—

- See* Ship.

Contract—

- Penalty or liquidated damages, 250.
- Breach of—Damages—Penal offence, 322.
- Agreement to build steamship—Delivery—Force majeure, 323.
- Building—Delay—Interference by wrongdoer, 324.
- Fraud on bankruptcy laws, 329.
- Rescission—Misrepresentation, 334, 337.
- Commercial impossibility, 409.
- Sale of foxes—Mixed breeds, 414.
- In writing—Rescission—Subsequent parol agreement, 446.
- See* Mines—Principal and agent—Theatre.

Conversion—

- Truck for sale, 360.

Copyright—

- Infringement—Injunction—Costs, 224.
- Railway Guide—Index of stations, 489.

Costs—

- Libel—Joint defendants, 148.
- Setting off, in separate actions, 328.
- Married woman—Liability, 440.
- See* Practice—Solicitor and client.

Creditors Relief Act—

- Priorities under, 231.

Criminal law—

- Cross examination of accused—Protection, 34.
- Carrie Davies case—Improper verdict, 135.
- Bribery by ministerial public officer, 223.
- Trial—One jurymen separated from rest, 246.
 - Plea of guilty—Misapprehension by prisoner, 247.
- Indecent exposure—Previous acts—Admissibility, 369.
- Prisoner in custody awaiting sentence—Other charges pending, 458.
- See* Extradition—False pretences—High treason—Murder—Vagrancy.

Crown—

Prerogative—Servants of—Liability, 231.
 Right of, to requisition land, 410.
See Certiorari—Expropriation—Navigable river.

Crown lands—

Location ticket—Transfer—Letters patent, 63.

Debentures—

See Insurance.

Devolution of Estates Act—

Mistakes in, 347.

Discovery—

Production—Privilege, 148.

Distress—

See Landlord and tenant.

Donatio mortis causa—

Bonds payable to bearer—Delivery, 239.

Easement—

Right of way—Private road, 227.

Editorials—

Alien enemies in public positions, 1.
 Ontario Bar Association, 8, 41, 203.
 Payment by a stranger, 10.
 Injuries to street car passengers in boarding and alighting, 14.
 The defence of the Suez Canal, 52.
 The arming of merchantmen, 53.
 Law students and the Bible, 57.
 Christian Science and the law, 58.
 Peace societies in war time, 59.
 Marriage and divorce in Canada—The law of, 81, 121, 206.
 The Minister of Justice—Superannuation allowance, 94.
 The law of the case, 95.
 Company law—Federal and provincial rights, 107.
 Canadian Bar Association—Notice of, 133.
 Criminal law—The Carrie Davies trial, 135.
 Keeping firearms in houses, 138.
 Peace theories, 140.
 The United States of Europe, 140.
 Alien enemies as litigants, 141.
 Canadian Bar Association—Addresses at first annual meeting, 161.
 Attempt to commit a crime, 219.
 The sinking of the Lusitania, 225.
 Reprisals in war time, 229.
 Priorities under the Creditor's Relief Act, 231.
 Report of Commission as to German atrocities, 235.
 International Law and Submarine Warfare, 236.
 Power of Provincial Legislatures to enact statutes affecting rights of non-residents, 265.
 Judicial changes in England, 288, 433.
 Costs as between Solicitor and Client, 289.
 Judgments as affected by the Statute of Limitations, 290.
 The making of Rules of Court, 305.

Editorials—Continued.

- Judicial irony, 308.
- The Ministry of Munitions, 310.
- Rights of aliens in relation to property, 345.
- Devolution of estates, 347.
- Lawyers for legal officers, 347.
- Combatants and non-combatants, 348.
- Rights of minorities of shareholders in companies, 349.
- Professional ethics, 353.
- Is Christianity a part of the law?, 385, 474.
- Internment of alien enemies, 390.
- The national registry in England—Recruiting, 394.
- War and law discussed, 395.
- Commercial impossibility, 409.
- Killing prisoners, 409.
- Rights of Crown to requisition lands, 410.
- Attachment and Committal, 425.
- The legal aspect of Military Service in Canada, 428.
- The laws of war in ancient and modern times, 433.
- Liability for spread of fire, 436.
- Actions by alien enemies, 465.
- The enforcement of International Law, 472.
- Law officers of Crown as Cabinet Ministers, 475.
- Military service—The Freeman's privilege, 476.
- Employment of prisoners of war, 484.

Estoppel—

See Insurance.

Exchequer Court—

Jurisdiction—Trade mark, 68.

Executor and administrator—

- Right of retainer, 228.
- Administration—Improper payment of legacy duty out of capital, 360.

Expropriation of land—

- Payment into Court, 30.
- Public harbour—Water lot—Crown, 64.
- Market value, 64, 65, 104.
- Adding 10 per cent.—Crown, 65.
- Abandonment of public work—Damages, 66.
- Of proceedings—Compensation—Practice, 412.
- By railway—Plan—Severance, 35.
- Compensation—Minerals—Right of support, 103.
- Agreement to fix compensation, 110.
- Appointing arbitrator—Persona designata, 112.
- Material for construction, 237.

See Compensation.

Extradition—

France—Prisoner undergoing sentence escaping, 369.

False imprisonment—

Miner—Refusal to work, 249.

False pretences—

- Evidence, 144, 363.
- Obtaining goods on—Counts in indictment, 243.

Fatal Accident Act—*See* Negligence.**Firearms—**

Keeping them in houses, 138.

Fleming, Sir Sandford—

Obituary notice, 382.

Flotsam and jetsam—

79, 159, 264, 344, 424, 463, 503.

Foreign judgment—

Jurisdiction of foreign Court—Appearance—Setting aside writ, 367.

Fraud—*See* Company—Contract.**Fraudulent conveyance—**

To near relative—Bona fides—Practice, 411.

See Assignment f.b.o.c.**German atrocities—**

Report of Commission, 235.

High treason—

Aiding King's enemies—Assisting Germans to return, 319.

Highway

Laying mains under streets, 31.

Premises abutting on—Access, 32.

Old trails of Rupert's Land—Survey—Dedication, 150.

Quarry adjoining—Collapse of road and fence, 239.

Obstruction—Accident—Trolley poles, 415.

See Right of way.**Hughes, Judge—**

Obituary, 267.

Husband and wife—*See* Negligence.**Illegitimate child—**

Neglect of, 32.

Maintenance—Proof of parentage, 147.

Prior conviction of alleged father, 147.

Renewal of application for, 446.

Infant—

Action by, by next friend, also an infant, 238.

See Illegitimate child.**Insurance—**

Fire—

Arbitration clause—Condition precedent waiver, 333.

Statutory conditions—Stored or kept—Material circumstance, 372.

General conflagration—Demolition to stop fire, 413.

Consequential loss—Assessment of loss, 447.

Insurance—Continued.

Life—

Non-payment of premiums—Misrepresentation estoppel, 373.

Marine—

Running down clause, 33, 490.

Re-insurance—Compromise, 33, 364.

Concealment—Innocent mistake, 145, 369.

Alien enemy—Right of action, 233.

Perils of men-of-war—Restraints of princes—Putting into neutral port, 491.

Of debentures—Re-insurance, 226.

Interest—*See* Money lenders.**International law—**

And submarine warfare, 236.

The enforcement of, 472.

Interpleader—

Relying on title other than set up in issue, 328.

Japanese Courts—

Description of, 20.

Judgments—

As affected by statute of limitations, 290.

Judicial appointments—*See* Bench and bar.**Judicial Committee of Privy Council—**

Appeal to to stay of death sentence, 411.

Jurisdiction—Appeal from sentence of death, 491.

Jury—

One jurymen separated from rest, 246.

Trial by—Stranger in jury room, 368.

Justices—*See* Magistrates.**Landlord and tenant—**

Lease—Covenant to build, 28.

To renew, 228.

Not to assign without consent—Refusal—Reasonable cause, 318.

Securing with land, 357.

Agreement for—Assignment—Priority, 234.

Notice to quit—Agreement to cancel notice, 326.

Distress—Exemptions—Stranger, 246.

Law officers of Crown—

Appointment of, as Cabinet Ministers, 475.

Law Societies—

Canadian Bar Association, 123, 461.

Ontario Bar Association, 8, 41, 115, 161, 203, 501.

Law Societies—Continued.

Leeds and Grenville Bar Association, 37.
 Hamilton Bar Association, 77.
 Alberta Bar Association, 156.
 County of York Bar Association, 157.

Letters patent—

See Crown lands.

Libel and slander—

Business reputation—Comment—Justification—Misdirection, 253.
 Justification—Particulars—Character—Acts occurring after publication, 490.

Lien—

Motor car—Agreement to keep in repair, 319.

Light—

Enjoyment of—Specific performance, 29.

Limitation of actions—

Protection of Public Authorities Act, 245.
See Company.

Liquor license—

Sale in prohibited house, 489.
 Gratuitous supply to friends of licensee, 489.

Lusitania—

Sinking of, by Germany—Law as to, 227.

Local improvement—

Dwelling unfit for habitation—Closing order, 329.

Magistrates' Court—

Appeal from—Notice, 31.

Malicious prosecution—

Proof of damage, 299.

Mandamus—

Prerogative—Company—Registration—Name, 146.

Marriage—

Breach of promise—Action against executor of promisor, 325.

Marriage and divorce—

Law of in Canada discussed, 81, 121, 205.
 Prohibited degrees, 182, 251.

Married women—

Personally ordered to pay costs—No separate estate, 440.

Marriage settlement—

See Settlement.

Master and servant—

Notice of injury—Workmen's Compensation Act, 144.
Contract—Breach—Notice—Continuation after notice, 487.
See Negligence—Restraint of trade.

Mechanic's lien—

Action to enforce, 63.

Military service—

Legal aspect of, in Canada—Militia Act, 428.
The freeman's privilege, 476.

Mines—

Grant of surface—Reservation, 293.
Sale of—Contract—Reservation—Forfeiture, 371.

Minister of Justice—

Right to salary as a retired Judge, 94.

Misrepresentation—

See Insurance.

Mistake—

See Building society—Insurance.

Moratorium—

Registered judgment is not an "instrument," 374.

Motor car—

Agreement to keep in repair, 319.

Money lenders—

Excessive interest—Oppression, 322, 487.

Mortgage—

Assignment by way of—Expectant shares of next of kin, 488.

Municipal law—

Undertaking with ratepayer—Taxes—Discretion, 35.
Water company—Supply—Liability of company to ratepayer, 62.
Negligence—Misfeasance, 109.
Closing house unfit for habitation, 329.
By-law closing lane—Powers, 331.
See Public authorities.

Munitions—

The Minister of, 310.

Murder—

Provocation—Sanity, 145.
Manslaughter—Judge's charge, 364.

Navigable river—

Bed of in Crown—Grant—Construction, 67.

Negligence—

- Death—Action by family—Fatal Accident Act, 103.
- Of wife—Husband's pecuniary loss, 320.
- Municipality—Misfeasance, 109.
- Industrial company—Defective system—Managing director, 111.
- Master and servant—Liability—Use of motor car—Disobedience, 149.
- Omnibus—Conductor or driver, 320.
- Defective system—Injury to servant, 302, 374.
- Dangerous premises—Steps—Defective railing, 320.
- See Railway.

New trial—

- Fresh evidence—Verdict by fraud, 323.

Notice—

- See Adulteration—Appeal—Assignment f.b.o.c.—Company—Landlord and tenant—Magistrate's Court—Master and servant—Schools—Vendor and purchaser—Workmen's Compensation Act.

Nuisance—

- Various companies laying mains under streets, 31.
- Colliery company—Lessees from common lessor—Rights, 492.
- See Highway.

Obituary—

- See Bench and Bar.

O'Brien, Lt. Col. W. E.—

- Obituary, 70.

Ontario Bar Association—

- Meetings of, 8, 41, 115, 161, 203, 502.

Patent for invention—

- Petition for license, 356.

Partnership—

- Lease—Scope of authority—Pleading, 36.
- Trading firm—Implied authority of partner, 146.

Payment—

- By a stranger, 10.
- Into Court, 30.

Peerages—

- Modern legal, 311.

Perpetuity—

- See Settlement.

Persona designata—

- Arbitration—Appointment of Judge, 112.
- See Appeal.

Power of appointment—

- To object of power—Condition, 225.
- Revocation—Settlement, 296.

Power of appointment—Continued.

Special—Delegation, 360.

Jointly and to survivor—Revocation, 440.

By will during coverture, 441.

Practice—

Fund in Court—Payment out, 227.

Costs following event, 231.

Claim for declaratory judgment—No cause of action, 366.

See Infant—Solicitor and client—New trial.

Principal and agent—

Parol contract—Customs Act—Mandate, 65.

Sale of goods—Del Credere Commission, 223.

See Real Estate Agent.

Prisoners of war—

Employment of, 484.

Prize Court—

See Ships.

Public Authorities Protection Act—

Limitation of actions, 244.

Public Works—

See Railway.

Railway—

Insolvency of—Sale—Subsidy, 68.

Traffic between Canada and United States, 102.

Powers of Dominion and Provincial Legislatures, 237.

Negligence in operation—Employers' liability, 109.

Omission to fence—Culvert—Station yard, 248, 254.

Carriage of goods—Owner's risk, 234, 363.

Carrying person in charge of live stock—Free pass—Liability, 300.

Government railway regulations—Operation—Accident, 412.

See Expropriation—Railway Commissioners—Street Railway.

Railway Commissioners—

Powers of—Order against Provincial Railway, 222.

Real estate agent—

Listing lands for sale—Powers, 300.

Reprisals—

In war—Law affecting, 229.

Restraint of trade—

Covenant in—House agent, 102.

Reasonable protection severability, 225, 293.

Master and servant—Soliciting customers, 317.

Mechanical engineering, 359.

Right of way—

Easement—Private road, 227.

Rules of Court—

The way they are often made, 305.

Sale of goods—

Agency—Del Credere Commission, 223.

Performance—Appropriation—Tender, 240.

C.I.F. Contract—War risk for buyer's account, 242.

Payment on tender—Effect of war, 363.

Schools—

Assessment—Taxes payable by companies—Apportionment—Notice, 238.

Set Off—

See Costs.

Settlement—

Husband's life policy—Power of appointment—Revocation, 296.

Husband's chattels assigned to trustees, 377.

Perpetuity—Gift over, 357.

Ship—

Passenger—Steerage ticket—Conditions, 30.

The arming of merchantmen, 53.

Charter party—Sale of ship, 242, 490.

Cessation of payment of hire—Loss of time, 367.

Prize Court—Cargo shipped before war, 293.

Evidence in—Contraband—Continuous voyage, 486.

Dock—Contract for use of—Damage—Exemption clause, 445.

See Insurance, Marine.

Shop—

Automatic machine to shut door of, 243.

Solicitor and client—

Claim for indemnity—Alleged fraud, 101.

Agency, 225.

Change of solicitor—Handing over accounts, 238.

Costs barred by statute—Acknowledgment, 241.

Costs—Taxation, 241, 244, 289.

Agreement as to costs—Setting aside, 244.

Statute of limitations—

See Limitation of Actions.

Stranger—

Payments by, 10.

Street—

See Highway.

Street railway—

Injury to passenger in boarding and alighting, 14.

Passenger evicted on allegation he had not paid fare, 368.

Trolley poles on track—Obstruction—Statutory authority, 414.

Succession duties—

Provincial legislation—Powers—Taxation, 371.

Sunday observance—

Refreshment house—Ice cream, 233.

Tenant for life—

Limitation of chattels to—Remainderman, 358.

Tenant in common—

Or joint tenant—Will, 441.

Theatre—

Seat in, contract for—Right to eject, 229.

Trade mark—

Application for—Drawing, 68.

Jurisdiction of Exchequer Court, 68.

Trial—

See Criminal law—Jury.

Trusts and trustees—

Resulting trust—Clayton's case, 26.

Breach of trust—Paying trust money into private account, 237.

Right to release part of mortgaged property, 238.

Vagrant—

Begging on street, 247.

Vendor and purchaser—

Light—Specific performance, 29.

Building scheme—Restrictive covenant, 223.

Property subject to change—Trustee's position, 238.

Failure to complete purchase—Notice—Return of deposit, 332.

Contract—Misrepresentation, Rescission, 337.

Deferred payment—Omission of date—Delivery, 448.

War—

See Alien Enemy—Contract—Insurance (Marine)—War Notes.

War notes—

Lawyers at the front, 119, 239, 242, 258, 259, 304, 383, 416.

Lord Haldane's position, 25.

"The Day"—Chappel's poem, 39.

The Prussian Character, 40.

The arming of merchantmen, 53.

Peace societies in war time, 59.

Sonnet to America, by Poet Laureate, 77.

Gifts by Judges and Benchers to army, 78.

The United States and neutrality, 118, 119, 159, 244, 498.

Lord Cockburn's reminiscences, 119, 158.

Peace theories—Helplessness of international law, 140.

The sinking of the Lusitania, 227.

Reprisals, 229.

German atrocities—Report of Commission on, 235.

International law and submarine warfare, 236.

The Minister of Munitions, 310.

Combatants and non-combatants, 348.

Diminution of crime since war began, 384.

National register in England, 394.

War notes—Continued.

- War and law discussed, 395.
- Killing prisoners, 410.
- Lawyers and their duty, 416.
- The way to victory, 418.
- Proclamations, etc., etc., 429.
- Laws of in ancient and modern times, 429.
- Message from the King, 462.
- Consolidation of the Empire by the war, 463.
- See Alien Enemies—High treason—Sale of goods.

Will—

- Foreign—Devise of realty in England, 359.
- Of soldier on actual service—Attestation, 442.
- See Power of appointment—Will.

Wills, construction of—

- Legacy—Ademption—Purchase for special purpose, 26.
- Devise to nearest male heir, 100.
- Legacy to church—Lapse, 149.
- Gift to cousins and half cousins, 224.
- Trust—Life interest—Apportionment, 235.
- Election—Restraint on anticipation, 297, 298.
- Gift free of legacy duty, 319.
- Charitable legacy, 356, 443.
- Substitutional gift—Parents' share to children—Joint tenancy or in common, 441.
- Annuities charged on income—Insufficiency, 444.
- Codicil—Residuary bequest, 444.
- Devise to A, "or his issue"—Estate tail, 445.

Words, meaning of—

- Accident, 100.
- Carrying on business, 102.
- Listing, 300.
- Shall be paid, 441.
- Stored or kept, 373.
- Vendor, 223.

Workmen's Compensation Act—

- Notice of injury, 144.



